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Volume 22

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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vs.

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—3167) * *

TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

J. W. Norwood,
Trial Examiner.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—3167) * *

TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Dated May 24, 1941.)

Pursuant to the provisions of an Act of Congress, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 (the Federal Trade Commission Act), and also pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (The Robinson-Patman Act), the Federal Trade Commission, alleging its reason to believe that the respondents named herein have violated the said Acts of Congress, and that a proceeding by it in respect thereof would be in the public interest, did on the 2nd day of July, 1937, issue its complaint in this proceeding, charging said respondents in Count I thereof with violation of Sec. 5 of the said Commission Act, and in Count II thereof with violation of Sec. 2 of the said Clayton Act, as amended, and alleging substantially as follows:

Synopsis of Complaint.

Count I.

I. That respondents, The Cement Institute, S. W. Storey, president, and G. H. Reiter, secretary, the Aetna Portland Cement Company, and the seventy-four (74) other companies herein named, are engaged in the manufacture and sale of portland cement;

II. That the said parties ship their said product from the various States and Territories of the United States into other States and Territories and into the District of Columbia in interstate commerce;

III. That cement is a standard commodity, the production of which belongs to the heavy goods industries wherein the carrying charges constitute a substantial part of the cost; that it is composed of limestone and shale, and is produced in widely separated portions of the country, including the States of Pennsylvania and thirty-six other States (named);

That from 1920 to 1930 the production of cement varied from over 99,000,000 to 1 8,000,000 barrels, with a money value of from $187,000,000 to over $288,000,000.; that cement is used for building, highway construction and repairs, etc., and is purchased by contractors and by Federal and State Governments, etc.;

IV. That respondents effected a combination among themselves to hinder, lessen, restrict and restrain price competition through mutual understanding and agreement to employ, and the actual employment of, methods and practices hereinafter set out in paragraphs V to VII inclusive;

V. That respondents cooperatively employed what is known as a multiple basing point pricing system by which their cement was sold—

(a) only at delivered prices which were

(b) arrived at by reference to a governing basing point

(c) determined by taking the lowest combination of base price plus freight to a given point,

(d) which method resulted in identical prices and quotations from all participating producers;

VI. That respondents submitted identical bids concertedly arrived at to various governmental agencies and others, the same as or similar to the examples set out and hereinafter referred to in this report;

VII. That respondents resorted to the following means of effecting restraint of price competition:

(a) Making and issuing through the Institute freight rate books designed to promote exact quotations and prices by securing to all participating producers an accurate common factor for use in computing prices;

(b) Using various means to suppress trucking, (1) charging 15¢ per bbl. extra, and (2) agreeing to refuse truck sales;

(c) Taking measures to prevent diversions which have the effect of breaking down the price structure;

(d) Refusing to bid f.o.b. mill to the United States Government and quoting destination costs with a "control clause" in the process of depriving the Government of the full benefits of land grant rates and price competition;

(e) Making arbitrary classification of customers;

(f) Combining to limit middlemen sales to those who fall within respondents' agreed and arbitrary definition of a "cement dealer;"

(g) Maintaining uniform terms and discounts as result of mutual understanding and concert of action;

(h) Preventing competition from foreign cement by (1) threats and boycotts, (2) espionage, (3) making concerted and uniform deviations from basing point prices at ports, and (4) taking other steps to prevent genuine price competition;

(i) Maintaining the Institute to interpret and formulate policies through its officers and trustees and through regional offices, freight bureaus and committees, and thus maintaining said pricing system;

(j) Collectively circulating false advertising to allay public suspicion and represent said pricing system to be a freely competitive system, and employing other methods in restraint of trade;

VIII. That respondents' activities destroyed price competition in the following particulars:

(a) (b) By producing a condition which prevents mills from selling lower in their home area where each mill receives its highest net and by making a high price which permits more distant mills to ship within said territory * * * and by encouraging cross shipping and making greater freight absorption possible;

(c) By employing the "pricing system" to prevent

variations in cost from being reflected by variations in price * * *, removing incentive to secure more volume at lower price * * * each mill thus sharing its territory with its competitors for the reciprocal concession which results from the pricing system * * * by preventing prices from reflecting differences in local demand * * * and by maintaining artificial price levels;

(g) By depriving buying public of transportation savings by basing all prices on all rail rates * * * enabling mills to retain such savings * * *;

(h) By resorting to practices involving concerted effort to avoid competition between wholesalers and producers as to certain U. S. jobs * * *, requiring certain U. S. agencies to purchase from dealers;

(i) By preventing State and Federal Governments from obtaining competitive prices * * * thus evading State and Federal laws and increasing cost of public works, etc., and by producing other unlawful effects.

IX. That such conditions and results could not be brought about by individual action and that they lessen, hinder, and restrain trade to the injury of the public;

Count II.

I to V. That the facts are as hereinabove stated in paragraphs I to V of count I;

VI. That delivered prices under the formula hereinabove set out are not the actual prices received by the producing respondents, but the true price is the amount which remains to the producer after the transportation charges are deducted, and that in view of this definition of price, respondents are discriminating in price between customers with the purpose and effect of preventing, lessening, and destroying competition in price on the part of each producing respondent which grants the discrimination, and with all other such producing respondents;

VII. (Sets out tabulations and examples to illustrate effect of the alleged price discrimination);

VIII. That the discrimination in price herein set forth in paragraphs VI and VII is the result of respondents' combination and conspiracy alleged in paragraphs IV and V hereof; that the effect is to injure, destroy, and prevent competition in price on the part of each producing respondent with all others who likewise grant discriminations under respondents' said pricing system;

IX. That the aforesaid acts and practices are unlawful price discriminations in violation of the Acts hereinabove mentioned.

The Answers.

To the aforesaid complaint the several respondents filed answers as contained in the record, which answers, too voluminous in the aggregate to be incorporated herein, deny the alleged violations of the said acts of Congress, and each respondent enters denial as to any agreement of understanding with competitors or with the Cement Institute as to prices to be charged for cement and as to any practices or policies alleged in the complaint. It is admitted that in some cases there is a uniformity of methods and quotations, but it is alleged that this is the natural result of conditions and developments in the trade, of the desires of customers, and of the nature of the commodity, its production, demand, transportation, and other circumstances of its distribution. It is also denied that any activities of respondents have the effect of restraining trade or lessening competition, and they also deny that any methods they employ involve price discrimination of any kind. Respondents contend further that their methods of pricing and distribution are more economical and more in accord with the public interest than any other methods that could be employed by them.

After the issuance of the said complaint, and the filing of the respondents' answers thereto, testimony and other evidence in support of the allegations of the said complaint were introduced by Walter B. Wooden, and other counsel for the Commission, before John W. Norwood, a trial examiner of the Commission thereunto duly designated and appointed, and testimony and evidence in opposition to the allegations of the complaint and in support of the said answers were introduced by George S. Leisure, and associates of record, representing the various respondents, and the same was received by the trial examiner aforesaid. The case was closed on the 29th day of November 1940. Under Rule XXII of the Commission's Rules of Practice counsel were permitted to submit a statement of their contentions as to the facts, which were duly presented to and considered by the trial examiner, copies of which are transmitted herewith for the information of the Commission.

Whereupon, under the Rules of Practice of the Commission, your examiner makes the following

Report Upon the Evidence.

Parties.

1. The Cement Institute is an unincorporated association which was organized on August 20, 1929 (Com. Ex. 136-A to M). While its membership has varied from time to time, all of the respondents have belonged at one time or another to the organization which has functioned since 1929 under its Articles of Association and the following agreements and authorities:

(a) A Code of Ethics adopted at the original organization in 1929 (Com. Ex. 138-B to U);

(b) A Code of Fair Competition for the Cement Industry, approved under the National Industrial Recovery Act on November 27, 1933 (Com. Ex. 557);

(c) An Amended Code approved May 11, 1935 (Com. Ex. 560). The Act was declared unconstitutional in the *Schechter* case on May 27, 1935, but the Amended Code was voluntarily observed in many particulars by the Institute and the industry (Tr. 3132-5; Com. Ex. 592-A, B), until

(d) The Compendium of Established Terms and Marketing Methods of the Portland Cement Industry, hereafter sometimes termed "The Compendium," was approved by its Board of Trustees and adopted by the Institute on December 11, 1935, when the Amended Articles of Association of the Cement Institute were adopted (Com. Ex. 561, pp. 210 to 229; see also Tr. 3008-37).

Almost all respondents belonged to the Institute during the Code period, beginning in 1933, and thereafter as shown below for each respondent.

2. During 1930 the Institute was composed of a Northeastern Division having an office at New York City, the Southeastern Division having an office at Chattanooga, the Chicago Division having an office at Chicago, and the Kansas City Division having an office at Kansas City. Early in 1931 these Divisions and Divisional Offices were abandoned but were revived at the beginning of the N.R.A. Code period in 1933, except the Southeastern office, which was never reestablished. In September 1936, these

Divisions and Divisional Offices were again abandoned and were never reestablished. The Institute, since March 1930, has had an office at Bethlehem, Pa., which compiled and disseminated freight rate information to subscribers. The Institute also had an office at Chicago, Ill., which compiled and disseminated freight rate information to subscribers from March 1930, to early in 1932. From early in 1932 until August 1933, there was no Chicago office and the Rate Bureau serving the Chicago area was located in New York City, N. Y. When the Chicago office of the Institute was reestablished in August 1933, it resumed the compilation and dissemination of freight rate information for subscribers in the Chicago area (Tr. 2797-9; Com. Ex. 136-A to I; Resp. Ex. 126-A to D; 127-A to D; Tr. 16707-19).

3. The stated objectives of the Institute, as set out in the Articles of Association and not substantially changed thereafter are:

"To promote the best interests of the cement industry by providing facilities for collecting, through voluntary action, information with respect to trade and commerce therein, and disseminating such information among the members of the Institute and the public generally. The information, so collected and disseminated, shall be as follows:

"Information concerning credits.

"Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement.

"Information concerning production and stocks on hand, of clinker and Portland Cement and shipments of Portland Cement, and cloth sack returns.

"To collect and disseminate such other and further trade information as the Institute may determine upon from time to time in accordance with the provisions of these Articles of Association.

"To adopt and promulgate a Code of Ethics for the government of the members.

"To establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable.

"To adopt lawful plans for the general development and improvement of the industry." (Com. Ex. 138-B, C).

(Compare these objectives with those in Com. Ex. 557-560).

4. Just prior to the adoption of the N.R.A. Code, the membership in the Institute diminished considerably, but by reason of the proposal that the Institute would be the organization through which the Code Authority would function, a number of respondents renewed their membership, and other members of the industry joined (Tr. 13283; 23923). As a matter of fact, the Institute represented the industry in the formulation and sponsorship of the N.R.A. Code. The Trustees of the Institute became the Code Authority for its administration (Tr. 16904; 16964; 17139; 16975-78; 2797-2803; Com. Ex. 606-F; 634-J; 556; 557; 560-B).

The various activities of the Institute in connection with those of the other respondents are shown hereafter throughout this report.

5. S. W. Storey was president of the Cement Institute on July 2, 1937.

George H. Reiter was general manager and secretary of the Cement Institute from 1925 to April 1937. He was manager of the Chicago Division of the Institute from February 1930 to December 1931, and from August 1, 1933 to June 1935. He also had duties in connection with the Code Authority as secretary from December 7, 1933, to December 1934, at which time he was made Chairman of the Code Authority and acted until the end of the Code period, while he was secretary of the Institute (Tr. 2797-99; 16712-14; Com. Ex. 627; 628).

6. The following were vice presidents of the Institute on July 2, 1937: Frank McKelvey and B. S. Smith. The treasurer was C. F. Conn. The trustees were: H. M. Scott, J. J. Porter, H. F. Jennings, A. J. Rooney, B. H. Rades, M. C. Monday, C. B. Condon, C. A. Brooke, W. R. Blair, C. Boettcher, E. E. Duque, F. P. Lucas, C. Hogan, J. B. John, F. McKelvey, V. N. Roadstrum, B. S. Smith, S. W. Storey, and J. S. Young (Com. Ex. 627).

7. AETNA PORTLAND CEMENT COMPANY, hereafter referred to as "Aetna," is a corporation organized under the laws of the State of Maine, with its principal place of business at Bay City, Mich., where it owns and operates a cement plant (Ans. Par. I; Tr. 498-9).

This company joined the Institute in June, 1933, with the advent of N.R.A. (Resp. Ex. 217a). Aetna submitted bids which were identical with those of several of its competitors as hereinafter more particularly described on

December 22, 1932 (Com. Ex. 1856), and on March 23, 1933 (Com. Ex. 1128-H; 1857). In recent years it has made no allowances for trucks loaded at mill (Com. Ex. 967-5B).

(See also*: As to pricing methods, Tr. 513; 881; 33384 et seq.; as to uniform policies, Com. Ex. 90-A; 967-5B; as to meetings and conferences with competitors, Tr. 559-83; 969; Com. Ex. 20-A to C; 21-A; 22-B; 23-A, B; 45-A; 1496-A to C).

8. ALPHA PORTLAND CEMENT COMPANY, hereafter referred to as "Alpha," is a New Jersey corporation organized in 1910 (Com. Ex. 3152-A), having its principal place of business at Easton, Pa. It has cement manufacturing plants located at Martins Creek, Pa.; Manheim, W. Va.; Catskill, N. Y.; Jamesville, N. Y.; LaSalle, Ill.; St. Louis, Mo., and Phoenixville, Ala. (Tr. 23012-17; 23042).

This company belonged to the Institute from 1929 to early 1931, when it resigned; it rejoined the Institute in June 1933, with the advent of N.R.A. (Tr. 23877; 23800; 23894; 23923; Resp. Ex. 725-728).

Alpha submitted bids which were identical with those of several of its competitors on January 18 and September 6, 1935 (Com. Ex. 178-A; 372-A); June 5 and September 8, 1936 (Com. Ex. 373-A; 303-D); and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 14808-23; 25406 et seq.; as to trucking, Com. Ex. 976-9B; as to other uniform dealer policies, Com. Ex. 731-4F; as to meetings and communications with competitors, Com. Ex. 1496-A to C; 1965-A; 2370-A, B; 3005-A.)

9. ARKANSAS PORTLAND CEMENT COMPANY, hereafter referred to as "Arkansas," was incorporated under the laws of the State of Arkansas in 1927. Its general office is located at Okay Junction, Ark. The company's stock is controlled by the Ideal Cement Company, Denver, Colo. (Ans. Par. I; Com. Ex. 3176-J and N; Tr. 12825; 13889.) Ideal also owns Oklahoma, Nebraska, Three Forks, and Union (id., see Colorado, infra).

This company was a member of the Institute from March

*Note: Citations following the identifying paragraph of each respondent refer to some evidence connecting the particular respondent with the policies and practices of the industry and the Institute as hereinafter reported in detail. Meetings connected with the Institute or the Code are not included.

14, 1930, to May 1931; it rejoined the Institute in June 1933, with the advent of the N.R.A. (Com. Ex. 136-2T; 136-3K-3L; 1033-C; Tr. 3877-78; Resp. Ex. 2173).

Arkansas submitted bids which are identical with those of several of its competitors, as hereinafter more particularly described, on January 19, 1931 (Com. Ex. 452-A); on June 14, 1935 (Com. Ex. 2453), and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 46503-7; as to uniform dealer policies, Tr. 46439-71; as to meetings, Com. Ex. 2242-7; 3305-D.)

10. ASH GROVE LIME & PORTLAND CEMENT COMPANY, hereafter referred to as "Ash Grove," is a Maine corporation, organized in 1907. Its principal office is in Kansas City, Mo., and one plant is located at Chanute, Kans. (Tr. 13575; 47632; Com. Ex. 3122-A). This company belonged to the Institute from January 1930 to February 1931; rejoined in June 1933 (Com. Ex. 136-2A, 2B; Resp. Ex. 2173; Tr. 13581-82).

Ash Grove submitted bids which were identical with those of several of its competitors on June 5, 1934 (Com. Ex. 166), and on April 23, 1936 (Com. Ex. 175-A), and on thirteen other occasions during the year 1936 (Com. Ex. 2493 to 2507).

(See: As to pricing, Tr. 12836; 13587; Com. Ex. 2416-A; as to uniform dealer policies, Tr. 13627; Com. Ex. 879-B; as to meetings and communications, Tr. 13610-11; Com. Ex. 1131-J; 3002-A.)

11. BEAVER PORTLAND CEMENT COMPANY, hereafter referred to as "Beaver," is an Oregon corporation having its principal place of business at Portland, Oreg. Its plant is located at Gold Hill, Oreg. (Ans. Par. II).

This company joined the Institute on June 15, 1933 (Resp. Ex. 2173-A to D). It was involved with several of its competitors in identical bidding on May 17, 1934 (Com. Ex. 162-B; C).

(See also: As to pricing, Com. Ex. 1207-C; Tr. 8617-18; as to uniform dealer policies, Com. Ex. 159; as to communications, Tr. 8634-7; 8786.)

12. BESSEMER LIMESTONE & CEMENT COMPANY, hereafter referred to as "Bessemer," is an Ohio corporation organized in July 1919. Its principal place of business is located at Youngstown, Ohio (Ans. Par. I).

Since July 1, 1935, Bessemer has operated one cement mill located at Bessemer, Lawrence County, Pa., from which it sells and ships its cement from a shipping point known as Walford, Pa. (Tr. 3099-436; 46157-226; Resp. Ex. 2345-A to J; 2346; 2347-A to F; 3481-82).

Bessemer joined the Institute in July 1935 (Tr. 32223). It was involved in identical bidding with several of its competitors as follows: January 18, 1935 (Com. Ex. 178-A), June 5 and July 21, 1936 (Com. Ex. 373-A; 1089).

(See: As to pricing, Tr. 11330; 32293-8; Com. Ex. 2823; as to meetings, Com. Ex. 2370-A, B; 3305-D.)

13. CALAVERAS CEMENT COMPANY, hereafter referred to as "Calaveras," is a Delaware corporation organized in 1925, and has its principal place of business in the city and county of San Francisco, Calif. (Ans. Par. I, Tr. 42850). It owns and operates one cement plant at Kentucky House, Calif. (Tr. 42851).

Calaveras became a member of the Institute on September 14, 1933, with the advent of the N.R.A. (Com. Ex. 661-D; 1033). This respondent was involved in identical bidding with its competitors as follows: May 17, 1934 (Com. Ex. 162-B); February 21, 1935 (Com. Ex. 111-F), and on May 3, 1937 (120-B). It was also involved in a joint bid with five others on March 26, 1934 (Com. Ex. 134-C).

(See also: As to pricing, Tr. 8617-18; 8683-88; Com. Ex. 971-9 I; as to tracking, Tr. 8684; dealer policies, Tr. 8694; 8763; Com. Ex. 1268; as to communications, Tr. 8634-7; 8786).

14. CALIFORNIA PORTLAND CEMENT COMPANY, hereafter referred to as "California," is a corporation organized under the laws of California in 1891, with principal place of business at Los Angeles, Calif. (Com. Ex. 3156-B). It is wholly independent, and operates one cement mill located near Colton, Calif. (Tr. 42455).

This respondent became a member of the Institute on June 15, 1933 (Resp. Ex. 2173-A to D), and continued until a time subsequent to the filing of the complaint.

California was involved in identical bidding with competitors as follows: On June 9, 1931 (Com. Ex. 1099-A), June 26, 1934 (Com. Ex. 1099-D), and on April 9, 1937 (Com. Ex. 135-B). It was also involved in a joint bid with five others on March 26, 1934 (Com. Ex. 134-C).

(See also: As to pricing, Com. Ex. 277-MM; 971-22Z;

Tr. 42543-82; as to uniform policies; Com. Ex. 967-10K; 1305; 1306-A; 1308-A; Tr. 9323-5; 9335-7; as to collective action, Tr. 8634-7; 8786; 9320.)

15. CASTALIA PORTLAND CEMENT COMPANY, hereafter referred to as "Castalia," was organized under the laws of Pennsylvania on April 5, 1897 (Com. Ex. 3121-A), and at one time maintained its principal place of business at Pittsburgh, Pa. In July 1932, its cement plant at Castalia, Ohio, was closed and it has since sold cement made by Medusa and shipped on its orders from the latter's plant (Com. Ex. 3128; Tr. 40450-4; 40552-4).

Castalia joined the Institute in March, 1930 (Com. Ex. 136-2R), but the books show no payment of moneys for dues after December 17, 1930 (Tr. 47674-75).

This respondent was involved in identical bidding with competitors on April 23, 1929 (Com. Ex. 1877). Castalia sold and shipped cement from Castalia, Ohio, into the States of Michigan, West Virginia, and elsewhere outside of the State of origin (Com. Ex. 3121-A to H). It also sold and shipped from Medusa's plant at Bay Bridge, Ohio (Resp. Ex. 3065; 3184-6).

(See: As to dealer policies, Com. Ex. 1935; as to pricing, Tr. 14808-23; as to meetings, Com. Ex. 1965-A, B; 3235-Z108.)

16. COLORADO PORTLAND CEMENT COMPANY, hereafter referred to as "Colorado," was incorporated under the laws of Colorado in 1901. Its general office is located at Denver, Colo. (Ans. Par. I; Com. Ex. 3176-P). The present corporation markets cement produced by mills owned and operated by the Ideal Cement Company in Colorado.

Colorado Portland Cement Company is owned by Ideal Cement Company (Tr. 13836-37), of which Mr. Charles Boettcher is president. Ideal also owns Arkansas, Nebraska, Three Forks, and Union Portland Cement Companies (Tr. 13835-53). Mr. Boettcher is president of all of these companies, and active in their affairs (Tr. 12825-32).

Colorado joined the Institute on June 15, 1933 (Resp. Ex. 2173; Tr. 13844; Com. Ex. 1270-B to J; 136; 137; 138). It was involved in identical bidding as follows: On April 23, 1936 (Com. Ex. 175-A) January 7, 1937 (Com. Ex. 125-B), and on April 9, 1937 (Com. Ex. 119-B).

(See also: As to pricing, Tr. 13899; Com. Ex. 967-13F;

as to meetings, Com. Ex. 3235-Z82; 2370-A, B; 3209; 3210; Tr. 20252-61; 25486; 25906-7; 27174-5. See also Arkansas, Oklahoma, Nebraska, Three Forks, and Union.).

17. CONSOLIDATED CEMENT CORPORATION, hereafter referred to as "Consolidated," is a Delaware corporation, organized in 1926, with its principal place of business at Chicago, Ill. (Ans. Par. I, Tr. 337-41). It operates two cement mills, one at Fredonia, Kans., and the other at Cement City, Mich. The mill which it operated at Mildred, Kan., has been dismantled (Tr. 13338; 47536).

Consolidated joined the Institute in 1930. It resigned the same year, and rejoined in June 1933 (Resp. Ex. 2173; Com. Ex. 136-2B; Tr. 13369-72).

It was involved in identical bidding as follows: April 23, 1936 (Com. Ex. 175-A), and six other times during 1936 (Com. Exs. 2495; 2499; 2500; 2501; 2595; 2507), and August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 47614; as to dealer policies, Resp. Ex. 1769; as to meetings, Com. Ex. 45-A; 1965-A, B).

18. COPLAY CEMENT MANUFACTURING COMPANY, hereafter referred to as "Coplay," is a Pennsylvania corporation with its principal place of business at Coplay, Pa. (Ans. Par. I, Tr. 49098). It has one plant, consisting of two units, one of which is located at Coplay, and the other at Saylor, Pa. (Tr. 48098-99).

Coplay joined the Institute in June 1933 (Tr. 48099-100). It was involved in identical bidding as follows: on September 6, 1935 (Com. Ex. 372-A); September 8, 1936 (Com. Ex. 303-D), and on January 18, 1935 (Com. Ex. 178-A).

(See: As to pricing, Tr. 6743-50; 6761-2; as to dealer policies, Com. Ex. 1140; Tr. 7080-81; as to meetings Com. Ex. 3235-Z46.)

19. CUMBERLAND PORTLAND COMPANY, hereafter referred to as "Cumberland," is a Delaware corporation with its principal place of business at Cowen, Tenn. It was organized in 1926, and has one mill, which is situated at Cowen, Tenn. (Tr. 39815).

Cumberland joined the Institute in 1929 (Com. Ex. 136-U to X; 1033-C; Tr. 39873), and it was involved in identical bidding as follows: On October 15, 1934 (Com. Ex. 401);

on June 16, 1936 (Com. Ex. 1096-B); and on August 30, 1937 (Com. Ex. 180-A).

(See: As to pricing, Tr. 39854, et seq.; as to meetings, Com. Ex. 3005-A; as to trucking, Com. Ex. 976-12N.)

20. DEWEY PORTLAND CEMENT COMPANY, hereafter referred to as "Dewey," is a West Virginia corporation organized in 1906 (Com. Ex. 31501B), with its principal place of business at Kansas City, Mo. It has one plant at Dewey, Okla., and another at Linwood, Iowa (Ans. Par. I, Tr. 14273-74; 46819, et seq.; Com. Ex. 2).

Dewey belonged to the Institute from January 24, 1930, to December 1930; it rejoined in June 1933 (Com. Ex. 139-A; 136-2B; Resp. Ex. 2173; Tr. 46764-69; 46774-76).

This respondent was involved in identical bidding as follows: On June 5, 1934 (Com. Ex. 166), and on January 6, 1936 (Com. Ex. 2493), and on ten other occasions during 1936 (Com. Exs. 2495; 2496; 2498; 2499; 2500; 2501; 2503; 2505; 2595; 2507).

(See also: As to pricing, Tr. 12666-8; 13380-6; Com. Ex. 2163-69; as to dealer policies, Com. Ex. 2386; as to meetings, Com. Ex. 1965-A, B; 1131-J, and 3235-Z82.).

21. DIAMOND PORTLAND CEMENT COMPANY, hereafter referred to as "Diamond," is an Ohio corporation, organized in 1897, having its principal place of business at Middle Branch, Ohio. It has one mill which is located at Middle Branch, Ohio (Ans. Par. I; Tr. 47756).

This respondent joined the Institute in 1930, and resigned during the same year. However, Diamond rejoined the Institute in June 1933 (Com. Ex. 1362-R; Resp. Ex. 2173).

(See also: As to pricing, Tr. 12199, et seq.; Com. Ex. 3139; as to dealer policies, Resp. Ex. 1751; Com. Ex. 1925; as to meetings, Com. Ex. 1965-A, B).

22. EDISON CEMENT CORPORATION, successor to Edison Portland Cement Company, hereafter referred to as "Edison," is a New Jersey corporation, with its principal place of business at West Orange, N. J. It was organized in January 1931. Its one mill is situated at New Village, N. J. (Ans. Par. I; Tr. 35588-93; Resp. Ex. 3543-44).

Edison joined the Institute in June 1933 (Tr. 35800-02), and was involved in identical bidding as follows: On Sep-

tember 8, 1936 (Com. Ex. 303-H); on June 20, 1936 (Com. Ex. 9-A), and on July 21, 1936 (Com. Ex. 1089).

(See also: As to pricing, Tr. 14806-23; Com. Ex. 3114; as to dealer policies, Resp. Ex. 2568; 2585; Tr. 7556; as to trucking, Tr. 7563).

23. FEDERAL PORTLAND CEMENT COMPANY, INC., hereafter referred to as "Federal," was incorporated in 1926 under the laws of the State of New York. Its principal place of business is at Buffalo, N. Y. It has one mill located at Hamburg, Erie County, N. Y. Prior to 1933 Bessemer sold its output, but since that date Federal has had its own sales force and has marketed its product under its own brand name (Tr. 30411-15; 30449-61).

Federal joined the Institute December 8, 1933 (Tr. 30713-14; Com. Ex. 617; 1033-C). It was involved in identical bidding as follows: invoices issued during April 1938, (Com. Ex. 2683, invoices 15 to 21, Binghamton, N. Y.), and invoice of April 27, 1938 (Com. Ex. 2683, invoice 40, Cortland, N. Y.).

(See also: As to pricing, Tr. 20552-91; 30777-95; as to dealer policies, Resp. Ex. 2131-A; B; 2135-A; B.).

24. FLORIDA PORTLAND CEMENT COMPANY, hereafter referred to as "Florida," is a Delawage corporation. Since 1926 its principal place of business has been at Chicago, Ill. It operates a mill at Tampa, Fla. (Ans. Par. I; Tr. 13338; 47578).

Florida joined the Institute late in 1929, but resigned in 1930. It rejoined in June 1933 (Tr. 13369-72; Com. Ex. 136-V; Resp. Ex. 2173). It was involved in identical bidding as follows: April 16, 1937 (Com. Ex. 1098); May 29, 1936 (Com. Ex. 1099-R) and on May 18, 1937 (Com. Ex. 1099-W).

(See also: As to pricing, Tr. 47614; as to dealer policies, Com. Ex. 331-B; as to trucking, Com. Ex. 975-13-o; as to other practices, see Trinity, Signal Mountain, or Consolidated; all under same management (Tr. 13321-73; 13480-91).

25. GEORGIA CEMENT & PRODUCTS COMPANY, hereafter referred to as "Georgia," is a Georgia corporation with its principal place of business at Atlanta, Ga. (Ans. Par. I). This respondent joined the Institute in 1929 (Com. Ex. 136-U to X).

Georgia was involved in identical bidding as follows: August 30, 1937. (Com. Ex. 180-A); October 15, 1934 (Com. Ex. 401); October 7, 1936 (Com. Ex. 1083), and June 16, 1936 (Com. Ex. 1096-A).

(See also: As to trucking, Com. Ex. 975-1D).

26. GIANT PORTLAND CEMENT COMPANY, hereafter referred to as "Giant," is a Delaware corporation organized in 1913, with principal office in Philadelphia, Pa. It has two plants, one at Egypt, Pa., and the other at Lesley, Pa. (Com. Ex. 3125-B; Ans. Par. I).

Giant joined the Institute in 1929 (Com. Ex. 136-G to J; Tr. 48103), and it was involved in identical bidding as follows: on June 20, 1936 (Com. Ex. 9-A), and on May 10, 1936 (Com. Ex. 1099-M).

(See also: As to pricing, Tr. 14807-23; as to dealer policies, Resp. Ex. 1462, 1470-A; as to meetings, Com. Ex. 3005-A).

27. GLENS FALLS PORTLAND CEMENT COMPANY, hereafter referred to as "Glens Falls," is a New York corporation organized in 1893 (Com. Ex. 3147), having its principal place of business at Glens Falls, N. Y. It has one cement mill at that place (Ans. Par. I; Tr. 47882-84).

This respondent joined the Institute in 1929 (Com. Ex. 136-G; 1033-C), and was involved in identical bidding as follows: on June 26, 1934 (Com. Ex. 387-D); on May 10, 1936 (Com. Ex. 1099-M), and on May 29, 1936 (Com. Ex. 1099-R).

(See also: As to pricing, Tr. 47917; as to meetings, Com. Ex. 3235-Z108).

28. GREAT LAKES PORTLAND CEMENT CORPORATION, hereafter referred to as "Great Lakes," is an Indiana corporation organized in 1926, having its principal place of business at Buffalo, N. Y. It has one plant at Buffalo, N. Y. (Ans. Par. I; Com. Ex 3151; 1).

Great Lakes joined the Institute in June 1933 (Com. Ex. 606-H).

This corporation has at all times sold its entire output to Lehigh, which owns over 50% of the stock and markets all of its cement (Tr. 26549).

29. GREEN BAG CEMENT COMPANY OF PENNSYLVANIA, hereafter referred to as "Green Bag Pennsylvania," is a Pennsylvania corporation, organized in

1929, with its principal office in Pittsburgh, Pa. It does not produce cement. It is wholly owned by the Pittsburgh Coke & Iron Co., and acts as a sales agent. (Ans. Par. I; Tr. 47628-29).

Green Bag Pennsylvania joined the Institute in 1933 (Com. Ex. 607-G), and was involved in identical bidding as follows: On January 18, 1935 (Com. Ex. 178-A); September 8, 1936 (Com. Ex. 303-D; Tr. p. 29541); May 15, 1937 (Com. Ex. 1099-W), and May 18, 1937 (Com. Ex. 387-I).

(See also: as to meetings, Com. Ex. 1965-A, B.).

30. GREEN BAG CEMENT COMPANY OF WEST VIRGINIA, hereafter referred to as "Green Bag West Virginia," is a West Virginia corporation. It has one mill which is located at Kenova, W. Va. (Ans. Par. I; Tr. 29397-98; 29400-91; 29404; 29480).

Green Bag West Virginia joined the Institute in 1933 (Resp. Ex. 2173; Com. Ex. 1033-C; Tr. 29543; 29546-47).

This respondent was involved in identical bidding as follows: June 5, 1936 (Com. Ex. 373-A), and on December 6, 1932 (Com. Ex. 386-G).

(See also: As to pricing, Tr. 29866-81.)

31. HAWKEYE PORTLAND CEMENT COMPANY, hereafter referred to as "Hawkeye," is a West Virginia corporation organized on January 13, 1916 (Com. Ex. 3142-A); its principal office is at Des Moines, Iowa. It has one plant located at Des Moines, Iowa (Ans. Par. I; Tr. 41601-02; 41637-38; Com. Ex. 3142-A to F).

Hawkeye belonged to the Institute from January 13, 1930, to February 13, 1930, when it resigned; it rejoined the Institute on June 15, 1933 (Com. Ex. 137; Tr. 41621-23; 41630-31; 41660-61; 41823-24; 41836; 41917).

This respondent was involved in identical bidding as follows: On June 5, 1934 (Com. Ex. 166); on November 7, 1932 (Com. Ex. 2442), and on March 5, 1929 (Com. Ex. 2437).

(See also: As to pricing, Tr. 12793-5; 41613-17; Com. Ex. 2230-A, B.)

32. HERCULES CEMENT CORPORATION, hereafter referred to as "Hercules," was organized under the laws of Pennsylvania in 1916. Its principal place of business is at Philadelphia, Pa. (Ans. Par. I; Tr. 10566-67; 10570-71; 25973-74).

Hercules belonged to the Institute from 1929 to date of complaint (Tr. 10582-23; Com. Ex. 136-A; Resp. Ex. 2173), and was involved in identical bidding as follows: On May 10, 1935 (Com. Ex. 1099-M; on May 18, 1937 (Com. Ex. 1099-W); and on September 8, 1936 (Com. Ex. 303-D).

(See also: As to pricing, Tr. 10595; as to trucking, Tr. 10557; Com. Ex. 1442-A; as to dealer policies, Tr. 10565; as to meetings, Com. Ex. 2370-A, B; 3005-A; 3305-D.)

33. HERMITAGE PORTLAND CEMENT COMPANY, hereafter referred to as "Hermitage," is a Delaware corporation organized in 1922 (Com. Ex. 3120-A), with principal place of business in Nashville, Tenn. It started shipments in May 1924 (Ans. Par. 1; Tr. 36097). Hermitage has one mill and no supplementary plants (Tr. 36099). It has financial connections with the Cumberland Portland Cement Company (Tr. 36107-08).

Hermitage joined the Institute in 1929 (Com. Ex. 136-U to X; Tr. 36333-34; 36257-58; 36265-66; 36411-13; 36421-22), and it was involved in identical bidding as follows: On October 7, 1936 (Com. Ex. 1083); and on August 30, 1937 (Com. Ex. 180-A).

(See: As to pricing, Tr. 36337-43; Com. Ex. 3120; as to dealer policies, Com. Ex. 813-BB; Resp. Ex. 2698; as to trucking, Com. Ex. 976-10T.)

34. HURON PORTLAND CEMENT COMPANY, hereafter referred to as "Huron," is a Michigan corporation organized in 1907, with principal place of business at Detroit, Mich. (Tr. 11014). This respondent sells the output of cement mills located at Alpena and Wyandotte, Michigan, and it operates and sells cement through offices and plants located Duluth, Minn., Milwaukee and Green Bay, Wis.; Alpena, Muskegon, Saginaw, and Detroit, Mich.; Toledo and Cleveland, Ohio; Buffalo and Oswego, N. Y. (Tr. 33626; 33442; Resp. Ex. 2392).

Huron joined the Institute June 15, 1933, and resigned January 24, 1939 (Resp. Ex. 2173-A to D; Tr. 33665), and was involved in identical bidding as follows: June 3, 1934 (Com. Ex. 166); July 25, 1935 (Com. Ex. 168-A), and on January 18, 1935 (Com. Ex. 178-A).

(See also: As to pricing, Tr. 11020-30; as to trucking and meetings, Tr. 559-83; 11067-83; 11529-33; Com. Ex. 22-B; 23-A; 45-A; 1496-A to C; 1965-A, B.)

35. IDAHO PORTLAND CEMENT COMPANY, hereafter referred to as "Idaho," is an Idaho corporation, having its principal place of business at Inkom, Idaho (Ans. Par. I; Tr. 47636). It began to manufacture cement in 1929 (Tr. 47637).

This respondent joined the Institute in 1933 (Tr. 47638; Com. Ex. 617-A to E.)

(See also: As to pricing, Tr. 47639; as to meetings and discussions, Com. Ex. 1196-97; 1202; as to trucking, Com. Ex. 967-6R.)

36. INTERNATIONAL CEMENT CORPORATION was incorporated under the laws of the State of Maine in 1919. The name was changed to LONE STAR CEMENT CORPORATION, hereafter referred to as "Lone Star," in 1936, and its subsidiary companies in the United States were merged into a single corporation since known as Lone Star Cement Corporation. Its principal place of business is at New York, N. Y. (Tr. 34667). The corporation has ten cement plants operating under eight district offices as follows: Hudson, N. Y.; Nazareth, Pa.; Norfolk, Va.; North Birmingham and Spocari, Ala.; New Orleans, La.; Manchester, Tex.; Harrys, Tex.; Limedale, Ind.; and Bonner Springs, Kans. (Tr. 34667; 6020).

International Cement Corporation joined the Institute on June 2, 1930 (Com. Ex. 136-AA to PP; Tr. 34565), and resigned on October 8, 1930 (Com. Ex. 140-A; Tr. 34566-67). It rejoined the Institute on June 15, 1933 (Resp. Ex. 2173; Tr. 34568).

The Lone Star companies were involved in identical bidding as follows: September 6, 1935 (Com. Ex. 372-A); August 17, 1936 (Com. Ex. 2507); April 23, 1936 (Com. Ex. 175-A); September 8, 1936 (Com. Ex. 303-D); and August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 6021-87; 33179-84; Com. Ex. 1112; as to dealer policies, Resp. Ex. 1759-A; 1761-A, B; Com. Ex. 1165-B, D, E, T, U, V, Y; Resp. Ex. 1469-A; Com. Ex. 286-J; 2426; 2427-A to E; as to meetings, Com. Ex. 580-A, B; 1131-G to J; 2370-A, B; 3005-A; as to trucking, Com. Ex. 969-3E, 3V.)

37. KEYSTONE PORTLAND CEMENT COMPANY, hereafter referred to as "Keystone," is a Pennsylvania corporation organized in 1926, with its principal place of business at Philadelphia, Pa. It began producing cement

in July 1928. It has branch sales offices in New York and Boston. It has one mill located at Bath, Pa. (Ans. Par. I; Tr. 27333-36.)

Keystone joined the Institute June 19, 1933 (Tr. 27383-49; 27550; 27557-60), and was involved in identical bidding as follows: September 6, 1935 (Com. Ex. 372-A); September 8, 1936 (Com. Ex. 303-D); May 10, 1935 (Com. Ex. 1099-M); and May 15, 1936 (Com. Ex. 1099-W).

(See also: As to pricing, Tr. 14806-25; as to dealer policies, Com. Ex. 1463; as to meetings, Com. Ex. 1965-A, B).

38. KOSMOS PORTLAND CEMENT COMPANY, hereafter referred to as "Kosmos," was incorporated in 1904 under the laws of the State of Kentucky. Its principal place of business is at Kosmosdale, Ky. The company has one plant located at Kosmosdale, Ky., and maintains warehouse facilities at Cincinnati, Ohio (Com. Ex. 3153; Tr. 12400; 12410; 36803).

Kosmos joined the Institute in June 1933; it resigned in November 1937 (Tr. 36974-76; Resp. Ex. 2770-71; 2173), and it was involved in identical bidding as follows: January 14, 1937 (Com. Ex. 1091), and October 15, 1934 (Com. Ex. 401).

(See also: As to pricing, Tr. 12401-11; as to dealer policies, Resp. Ex. 2767-8; as to trucking, Com. Ex. 970-D).

39. LAWRENCE PORTLAND CEMENT COMPANY, hereafter referred to as "Lawrence," is a Pennsylvania corporation organized in 1898. The company's main office is located at Northampton, Pa., and it maintains three branch offices at New York, Philadelphia, and Boston. (Tr. 31137-40; 7115; Com. Ex. 3126). It has two plants, one at Siegfried, Pa., and another at Thomaston, Maine, the latter built in 1928 (Tr. 7114-15; 8210-13).

Lawrence joined the Institute on June 15, 1933 (Resp. Ex. 2173; Tr. 31275-77), and was involved in identical bidding as follows: September 6, 1935 (Com. Ex. 372-A), January 18, 1935 (Com. Ex. 178-A), and on May 18, 1937 (Com. Ex. 1099-W).

(See also: As to pricing, Tr. 7115-32; 7279-88; as to dealer policies, Resp. Ex. 270-J; 1459; 1472-A; Tr. 7285; 7361).

40. LEHIGH PORTLAND CEMENT COMPANY, hereafter referred to as "Lehigh," is a Pennsylvania corporation organized in November 1897, with principal place of business at Allentown, Pa. (Ans. Par. I; Tr. 26547; 26650). The company has twelve plants, located at Sandts Eddy, Omrod, and Foglesville, all in the Lehigh Valley of Pennsylvania; Alsen, N. Y.; New Castle, Pa.; Union Bridge, Md.; Mitchell, Ind.; Oglesby, Ill.; Fordwick, Va.; Boyles, Ala.; Mason City, Iowa; Iola, Kans.; and Metalline Falls, Wash. (Tr. 26552-56).

Lehigh belonged to the Institute from 1929 to March, 1931; it rejoined the Institute in June 1933 (Tr. 26974; 27002-03; Resp. Ex. 2173). It was involved in identical bidding as follows: June 5, 1934 (Com. Ex. 166); January 18, 1935 (Com. Ex. 178-A); April 23, 1936 (Com. Ex. 175-A); and on seven other occasions during 1936 (Com. Ex. 373-A; 303-D; 2496; 2498; 2595; 2507; 2500), and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 3819-21; 12993-6; 14695-6; 14808-23; as to dealer policies, Resp. Ex. 1746; 1759-A, B; as to meetings, Com. Ex. 45-A; 1131-G, J; 1496-A to C; 3005-A and 3305-D).

LONE STAR CORPORATION, referred to as "Lone Star" (See International, Par. 30, supra).

41. MARQUETTE CEMENT MANUFACTURING COMPANY, hereafter referred to as "Marquette," is an Illinois corporation with its principal place of business at Chicago, Ill. (Ans. Par. I). It has mills at Oglesby, Ill., Cape Girardeau, Mo., and LaSalle, Ill. (Tr. 13960-69).

Marquette joined the Institute in June 1933 (Resp. Ex. 2173-A to D); resigned April 22, 1938 (Resp. Ex. 93; Tr. 39037).

It was involved in identical bidding as follows: June 5, 1934 (Com. Ex. 166); on March 25, 1936 (Com. Ex. 1878), and on March 12, 1938 (Com. Ex. 1914).

(See also: As to pricing, Tr. 14015; 14076-87; 14451; Com. Ex. 2644; Tr. 14550; 14589-91; 17545-6; 17553; Com. Ex. 2605; Tr. 19640; 39951-88; Com. Ex. 400-B; 971-29H; 2604-8; 2610; as to meetings, Com. Ex. 3235-Z82; 20-A to C; 23-A, B; Tr. 559-83; 609-13; 12555; 13968; Com. Ex. 3005-A to F).

42. MEDUSA PORTLAND CEMENT COMPANY, hereafter referred to as "Medusa," is an Ohio corporation (Tr. 40022), organized in 1900 (Com. Ex. 3118-D), with principal office at Cleveland, Ohio (Tr. 40025). The company operates six plants located at Manitowoc, Wis.; Dixon, Ill.; Silica, Ohio; Bay Bridge, Ohio; Wampum, Pa., and York, Pa. (Tr. 40025-26).

Medusa joined the Institute on August 29, 1929 (Com. Ex. 136-G to I; 136-3K-3L; Resp. Ex. 2173; Com. Ex. 1033), and it was involved in identical bidding as follows: January 18, 1936 (Com. Ex. 178-A), September 6, 1935 (Com. Ex. 372-A), June 5, 1936 (Com. Ex. 373-A), and September 8, 1936 (Com. Ex. 303-D).

(See also: As to pricing, Tr. 11034; 14808-23; 40047-56; Com. Ex. 2763-4; 3118; as to dealer policies, Resp. Ex. 3158-E to 3158-F; as to meetings, Com. Ex. 27; 1364; 1496-A to C; 1965-A; Tr. 559-83; 11529-33; Com. Ex. 20-A to C).

43. MISSOURI PORTLAND CEMENT COMPANY, hereafter referred to as "Missouri," is a Missouri corporation, organized in 1906 (Com. Ex. 3117-B), with its principal place of business at St. Louis, Mo. It operates cement plants at Prospect Hill, Mo., and Sugar Creek, Mo. (Tr. 37123-25).

Missouri joined the Institute in January 1930 (Com. Ex. 136-2B); Tr. 37217-19; 37185), and it was involved in identical bidding as follows: July 17, 1936 (Com. Ex. 1,088); December 28, 1937 (Com. Ex. 1880), and on March 29, 1937 (Com. Ex. 1879).

(See also: As to pricing, Tr. 37119-23; 37427; as to meetings, Com. Ex. 1131-J).

44. MONARCH CEMENT COMPANY, hereafter referred to as "Monarch," is a Kansas corporation, organized in 1913, with principal office at Humboldt, Kans. It has one plant situated at Humboldt in the "Gas Belt" region. (Tr. 42183; 42206).

Monarch joined the Institute on January 24, 1930, and resigned shortly thereafter. It rejoined the Institute June 15, 1933 (Com. Ex. 136; Resp. Ex. 2173; Tr. 42196; 42316-23). It was involved in identical bidding as follows: June 6, 1936 (Com. Ex. 2493), and on twelve other occasions during 1936 (Com. Ex. 175-A; 2495; 2496; 2497;

2498; 2499; 2500; 2501; 2503; 2505; 2595; 2507), and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to dealer policies, Com. Ex. 2389; as to meetings, Com. Ex. 3235-Z82; as to pricing, Tr. 13400-2; 42191; Com. Ex. 3119).

45. MONOLITH PORTLAND CEMENT COMPANY, hereafter referred to as "Monolith Portland," is a Nevada corporation with its principal place of business at Los Angeles, Calif. (Ans. Par. I). It has one mill located at Monolith, Calif. (Com. Ex. 1).

Monolith joined the Institute in 1933 (Com. Ex. 1033-C), and was involved in identical bidding as follows: February 21, 1935 (Com. Ex. 111-F), May 31, 1937 (Com. Ex. 120-B), and April 9, 1937 (Com. Ex. 135-B).

(See also: As to pricing, Com. Ex. 971; 23-A to G; as to dealer policies, Com. Ex. 1989; 2090; as to meetings and communications, Tr. 8612; 8945; Com. Ex. 564-3Y; 638-U to Z; AA, BB; Tr. 8634-7; 8786).

46. MONOLITH PORTLAND MIDWEST COMPANY, hereafter referred to as "Monolith Midwest," is a Nevada corporation with its principal place of business at Los Angeles, Calif. It has one mill located at Laramie, Wyoming, which was constructed in 1929 (Resp. Ex. 2520; 3765). The Monolith Portland Cement Company owns part of the stock of the Monolith Portland Midwest Company (Tr. 9340-41).

Monolith Midwest joined the Institute in 1933 (Com. Ex. 1033-C), and was involved in identical bidding as follows: Invoices dated April 2, April 4, April 8 and April 9, 1938 (Com. Ex. 2722, invoices numbered 4, 5, 14 and 15 respectively; these prices were identical with those bid by Colorado Portland Cement Company on the same items), and invoices of April 6, April 15, April 28, 1938 (Com. Ex. 2722, invoices numbered 10, 30 and 58 respectively; these prices were identical with those bid by Portland Cement Company of Utah).

(See: As to pricing, Com. Ex. 1202-G, H).

47. NATIONAL CEMENT COMPANY, hereafter referred to as "National," is an Alabama corporation, incorporated in 1922. Its principal place of business is at Birmingham, Ala. It has one mill located at Ragland, Ala. (Ans. Par. I; Tr. 39531; 39486-89; 39480; Resp. Ex. 3012).

National joined the Institute in 1929 (Tr. 39538), and was involved in identical bidding as follows: July 17, 1936 (Com. Ex. 1088), June 16, 1936 (Com. Ex. 1026-B), and August 30, 1937 (Com. Ex. 180-A).

(See: As to trucking, Com. Ex. 976-9X; as to pricing, Tr. 39598-9; 39713; Com. Ex. 3116).

48. NAZARETH CEMENT COMPANY, hereafter referred to as "Nazareth," is a Pennsylvania corporation, organized in 1918. Its main office is at Nazareth, Pa. It operates one mill at Nazareth, Pa. (Ans. Par. 1; Tr. 27965-66; 4018-19; 28015-16).

Nazareth joined the Institute in 1929 (Tr. 28005; Com. Ex. 136; 1033; 625), and it was involved in identical bidding as follows: September 6, 1935 (Com. Ex. 372-A), September 8, 1936 (Com. Ex. 303-D), and June 28, 1936 (Com. Ex. 9-C).

(See also: As to dealer policies, Resp. Ex. 1488; 1489; Tr. 4023; 4031; as to meetings, Com. Ex. 2370-A, B; 3235-Z108; Tr. 19063-4; as to pricing, Tr. 4022-31; 14808).

49. NEBRASKA CEMENT COMPANY, hereafter referred to as "Nebraska," is a Delaware corporation and was incorporated December 1, 1936. The company's stock is controlled by the Ideal Cement Company, Denver, Colo. It is identical in name with a Nebraska corporation which also belonged to Ideal and was dissolved June 9, 1937. The old company did, and the new company does now, operate the mill owned by Ideal Cement Company, which is located at Superior, Nebr. (Ans. Par. 1; Tr. 12825; 13836-97; 41959, et seq.)

Nebraska Cement Company (the old one) joined the Institute in May 1930, resigning in September of the same year. It rejoined the Institute in June 1933, and the new company took over the membership (Tr. 4961-62; Com. Ex. 136-3F; Resp. Ex. 2174; Com. Ex. 1033-C).

Nebraska Cement Company was engaged in identical bidding as follows: November 7, 1932 (Com. Ex. 2442) and (the new company) on May 22, 1937 (Com. Ex. 366-B).

(See also: As to dealer policies, Resp. Ex. 3421; 3422; as to meetings, Com. Ex. 2242-7; 3305-D; as to communications, Com. Ex. 2237).

50. NORTH AMERICAN CEMENT CORPORATION, hereafter referred to as "North American," is a Delaware corporation organized in 1925, with principal

place of business at Albany, N. Y. (Ans. Par. 1; Tr. 33739). It owns and operates three cement producing plants which are located respectively at Howes Cave, N. Y., Catskill, N. Y., and at Security, Md. (Tr. 33989; Com. Ex. 3124-A to F).

North American joined the Institute June 15, 1933 (Resp. Ex. 2173; Tr. 33907), and it was involved in identical bidding as follows: September 8, 1936 (Com. Ex. 303-D), June 16, 1936 (Com. Ex. 1096-B), and on May 18, 1937 (Com. Ex. 1099-W).

(See: As to pricing, Tr. 7513-38; 14807-25; 37079; Com. Ex. 309; 316, 318; as to dealer policies, Resp. Ex. 1457; 1468; as to meetings, Com. Ex. 1199-A and 3005-A).

51. NORTHWESTERN PORTLAND CEMENT COMPANY, hereafter referred to as "Northwestern Portland," is a Washington corporation organized in 1926 (Com. Ex. 3172-A), with principal place of business in Seattle, Wash. (Ans. Par. I). It has one cement plant located at Grotto, Wash. (Tr. 8583). This company sold and shipped cement from Grotto in the State of Washington into the State of Oregon in 1928, and 1929, and into Vancouver, B. C. in 1930, and 1931 (Tr. 8595-6).

Northwestern Portland joined the Institute on June 15, 1933 (Resp. Ex. 2173-A to D), and was engaged in identical bidding as follows: February 21, 1935 (Com. Ex. 111-F), and on August 20, 1935 (Com. Ex. 112-D).

(See: As to pricing, Tr. 8525-88; Com. Ex. 967-2L to 11B; as to meetings, Tr. 9151).

52. NORTHWESTERN STATES PORTLAND CEMENT COMPANY, hereafter referred to as "Northwestern States," is a West Virginia corporation organized in April 1906 (Com. Ex. 3175-A). Its principal place of business is in Mason City, Iowa; it has one sales office in Minneapolis, Minn. It has two plants, one at Mason City, Iowa, built in 1908, and one at Gilmore City, Iowa, which it purchased in 1926 (Tr. 36473-77).

Northwestern States joined the Institute in January 1930 (Tr. 36489; 36484; 36491-94; 36502-13; 36497), and it was involved in identical bidding as follows: February 18, 1931 (Com. Ex. 1909), June 6, 1933 (Com. Ex. 1912), and on June 5, 1936 (Com. Ex. 166).

(See also: As to pricing, Tr. 12514-20; 36620-29; as to dealer policies, Com. Ex. 1907; Tr. 12634; as to meetings, Tr. 12634; Com. Ex. 2197-8; 3235-Z82).

53. OKLAHOMA PORTLAND CEMENT COMPANY, hereafter referred to as "Oklahoma," was incorporated under the laws of Oklahoma in 1906. Its general office is located at Denver, Colo., and it has a branch office in Oklahoma City, Okla. It sells the product of two mills, both located at Ada, Okla., which are owned and operated by Ideal Cement Company (Com. Ex. 3176-D, Z-2A; Ans. Par. I; Com. Ex. 3176-Y-BB; Tr. 46564).

Oklahoma joined the Institute January 24, 1930; resigned subsequently but rejoined on June 15, 1933 (Com. Ex. 136-2B; Resp. Ex. 2173; Com. Ex. 1033-C), and it was engaged in identical bidding as follows: January 6, 1936 (Com. Ex. 2493), and on twelve other occasions during 1936 (Com. Ex. 175-A; 2495; 3496; 3498; 2499; 2500; 2501; 2503; 2505; 2506; 2595; 2507).

(See: As to pricing, Tr. 13403-6; 46503-8; 46626; Com. Ex. 967-13F; as to dealer policies, Resp. Ex. 3579; 3581; as to meetings, Com. Ex. 2242-47; 3305-D; 3235-Z82; 3235-Z108.)

54. OREGON PORTLAND CEMENT COMPANY, hereafter referred to as "Oregon," is a Nevada corporation organized in 1915 (Com. Ex. 3173-A), with principal place of business at Portland, Oreg. (Ans. Par. I). It owns and operates two cement mills located respectively at Lime and at Oswego, Oreg. (Tr. 8467).

Oregon joined the Institute June 15, 1933; it resigned about December 10, 1936 (Resp. Ex. 2173; 127-C). It was involved in identical bidding as follows: May 17, 1934 (Com. Ex. 162-B; 162-C). Oregon sells and ships cement from the aforesaid plants in the State of Oregon to and into the States of Washington and Idaho (Tr. 8467; Com. Ex. 1328-31).

(See also: As to pricing, Tr. 8616-20; Com. Ex. 967-3Q, 4G-8; 971-9I; 1214; as to meetings, Tr. 8470; Com. Ex. 1196-A; Tr. 8634-7; 8786.)

55. PACIFIC PORTLAND CEMENT COMPANY, hereafter referred to as "Pacific," is a California corporation organized in 1927, having its principal place of business at San Francisco, Calif. It owns two cement manufacturing plants which are located at Redwood Harbor, Calif., and San Juan Bautista, Calif., respectively, the plant at San Juan Bautista not having been in operation since 1930 (Tr. 42835-36).

Pacific joined the Institute on June 15, 1933 (Resp. Ex. 2173-A to D), and was involved in identical bidding as follows: December 28, 1935 (Com. Ex. 1212-A), and June 26, 1934 (Com. Ex. 1099-D).

(See also: As to pricing, Tr. 8612-19; 8726-30; 4289; as to dealer policies, Com. Ex. 954-K, L; as to meetings, Tr. 9151.)

56. PEERLESS CEMENT CORPORATION, hereafter referred to as "Peerless," is a Michigan corporation organized January 1, 1936, having its principal place of business at Detroit, Mich. (Ans. Par. I). It is the successor of another corporation of the same name organized January 5, 1928, which went into receivership March 10, 1933, and was subsequently dissolved. The respondent operates two mills, one at Detroit and the other at Port Huron, Mich.

Peerless joined the Institute at the time of its organization in 1936 (Tr. 34295; Com. Ex. 136-2B).

Two items connecting this respondent with identical bidding are dated March 23, 1933 (Com. Ex. 1128-H and 1857).

(See also: As to pricing, Tr. 13561-8; 14808-12; as to dealer policies, Resp. Ex. 1263; as to trucking, Com. Ex. 970-6G; as to meetings, Com. Ex. 23; 45; 1496; Tr. 609-13; 11529-33.)

57. PENNSYLVANIA-DIXIE CEMENT CORPORATION, hereafter referred to as "Penn-Dixie," is a Delaware corporation organized in 1926, having its principal place of business at New York, N. Y. (Ans. Par. I; Com. Ex. 3135-A to K; Tr. 38131-33). It has eight mills, located at Kingsport and Richard City, Tenn; Clinchfield, Ga; Nazareth, Penn-Allen, and Bath, Pa.; Portland Point, N. Y.; and West Des Moines, Ia. (Tr. 38133).

Penn-Dixie joined the Institute in August 1929 (Com. Ex. 136-G to J.; Tr. 38465), and it was involved in identical bidding as follows: June 5, 1934 (Com. Ex. 166), September 8, 1936 (Com. Ex. 303-D), and August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 8075; 8097; 8135; 14803-24; as to trucking, Com. Ex. 975-6Z, 8H, 9O; as to dealer policies, Resp. Ex. 684; Com. Ex. 1192; Resp. Ex. 1460; 1471; as to meetings, Com. Ex. 2370; 1131; 3005-A; 580-A, B.)

58. PETOSKEY PORTLAND CEMENT COMPANY, hereafter referred to as "Petoskey," is a Delaware corporation organized in 1917. Its principal place of business is

at Petoskey, Mich., and its one mill is located at Lamsen, near Petoskey (Com. Ex. 3123-B).

Petoskey joined the Institute on January 24, 1930 (Com. Ex. 136-2B; Tr. 38787), and was involved in identical bidding as follows: June 6, 1933 (Com. Ex. 1912), March 9, 1934 (Com. Ex. 1913), and March 12, 1938 (Com. Ex. 1914).

(See also: As to pricing, Tr. 14803-24; 38746-99; as to meetings, Tr. 559-573; 583; 11529-33; 12555; Com. Ex. 20-A to C; 45-A; 1496-A, B; 1965-A, B; as to trucking, Com. Ex. 970-71.)

59. PITTSBURGH PLATE GLASS COMPANY, hereafter referred to as "Pittsburgh Plate Glass," is a Pennsylvania corporation organized in 1883, with principal place of business at Pittsburgh, Pa. (Ans. Par. I). It has one cement mill at Fultonham, Ohio (Com. Ex. 3155-A).

Pittsburgh Plate Glass joined the Institute June 15, 1933 (Com. Ex. 136-2B, 2N; Resp. Ex. 2173; 2840; Tr. 37718-21), and was involved in identical bidding as follows: June 5, 1936 (Com. Ex. 373-A), January 18, 1935 (Com. Ex. 178-A), and July 21, 1936 (Com. Ex. 1089).

(See also: As to pricing, Tr. 14803-24; 37882; 38036-9; as to trucking, Com. Ex. 969-R; as to dealer policies, Com. Ex. 1933-4; Resp. Ex. 1754-1766.)

60. PORTLAND CEMENT COMPANY OF UTAH, hereafter referred to as "Portland of Utah," is a Wyoming corporation, organized in 1909, with its principal place of business at Salt Lake City, Utah. It has one mill at Salt Lake City, Utah (Ans. Par. I; Com. Ex. 3137).

Portland of Utah joined the Institute in December 1936 (Resp. Ex. 127-C; Com. Ex. 1033), and was involved in identical bidding as follows: Invoices of April 12, 1938 and April 22, 1938 (Com. Ex. 2703) contain identical bids with those of Monolith Midwest (Com. Ex. 2722, invoices 10, 30, 58).

(See also: As to meetings, Com. Ex. 3235-Z82.)

61. RIVERSIDE CEMENT COMPANY, hereafter referred to as "Riverside," is a Delaware corporation incorporated in 1928, with its principal place of business at Los Angeles, Calif. It owns and operates a cement plant at Crestmore, Calif.; it also owns a mill at Oro Grande, Calif. (Tr. 42869).

Riverside joined the Institute June 15, 1933, and resigned November 1, 1939 (Tr. 42877). It was involved in identi-

cal bidding on June 9, 1931 (Com. Ex. 1099-A), and June 26, 1934 (Com. Ex. 1099-D). It also made a joint bid with five others on the Boulder Canyon project (Com. Ex. 134-C), all identical bids.

(See also: As to pricing, Tr. 9034-55; 9078, et seq.; as to trucking, Com. Ex. 967-9B; as to dealer policies, Com. Ex. 1295-B, DD; Tr. 8979-80; 8986; 8994; 9030-32.)

62. SANTA CRUZ PORTLAND CEMENT COMPANY, hereafter referred to as "Santa Cruz," was incorporated under the laws of California in 1905, and has its principal place of business in the city and county of San Francisco, Calif. (Ans. Par. I; Tr. 42858). Its plant is located at Davenport, in Santa Cruz County, Calif. (Tr. 42859).

Santa Cruz joined the Institute June 15, 1933 (Resp. Ex. 2173-A to D), and it was involved in identical bidding as follows: February 21, 1935 (Com. Ex. 111-F), June 26, 1934 (Com. Ex. 1099-D), and on December 28, 1935 (Com. Ex. 1212-A).

(See also: As to pricing, Tr. 8613-18; 8726-30; 42864; as to trucking, Com. Ex. 967-7-I; Tr. 8645; as to dealer policies, Com. Ex. 1221; 1223; 1224; 1218; 1251; 1262; 1232; 1233; 1261; 1265; Tr. 8630-33; as to meetings, Tr. 8645; 8659-61; 9151.)

63. SIGNAL MOUNTAIN PORTLAND CEMENT COMPANY, hereafter referred to as "Signal Mountain," is a Delaware corporation organized in 1923, with principal place of business at Chicago, Ill. It has one mill at Chattanooga, Tenn. (Ans. Par. I; Tr. 13337-38).

Signal Mountain joined the Institute in 1929; it resigned in 1930. It rejoined the Institute in June 1933 (Tr. 13369-72; Com. Ex. 136-V; Resp. Ex. 2173). It was involved in identical bidding as follows: July 17, 1936 (Com. Ex. 1088), June 16, 1936 (Com. Ex. 1096-A), and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 47613 et seq.; as to trucking, Com. Ex. 975-12Z; as to meetings, policies, etc., see Trinity, Florida, or Consolidated, under same management.)

64. SOUTHERN STATES PORTLAND CEMENT COMPANY, hereafter referred to as "Southern States," is a Georgia corporation with principal place of business at Rockmart, Ga. It began operations in 1903. It has one

mill located at Rockmart, Ga. (Ans. Par. I; Tr. 37472-74; 37476-79).

Southern States joined the Institute in 1929 (Com. Ex. 136-W; 1033-A). It was involved in identical bidding as follows: August 27, 1935 (Com. Ex. 1082), and on June 16, 1936 (Com. Ex. 1096-A).

(See also: As to pricing, Tr. 37602-17; as to trucking, Com. Ex. 976-15F; as to dealer policies, Resp. Ex. 2821; as to meetings, Com. Ex. 3235-Z108).

65. SOUTHWESTERN PORTLAND CEMENT COMPANY, hereafter referred to as "Southwestern," was incorporated under the laws of the State of West Virginia in 1907. Its principal place of business is at El Paso, Tex., and its mills are located at El Paso, Tex.; Victorville, Calif.; and Osborn, Ohio. The El Paso mill was constructed in 1901; Victorville in 1915; and Osborn in 1924 (Tr. 8790-91; 8793-94; 28707; 38925).

Southwestern joined the Institute for its Osborn, Ohio, plant in January 1930 (Tr. 29152-56; Resp. Ex. 1804-05; Com. Ex. 136-AA to PP; 1033-C), and for its El Paso, Tex. and Victorville, Calif. plants on June 15, 1933 (Tr. 39140; 39254; 47670; Resp. Ex. 1806).

It was involved in identical bidding as follows: January 18, 1935 (Com. Ex. 178-A), April 23, 1936 (Com. Ex. 175-A), June 5, 1936 (Com. Ex. 373-A), and on July 21, 1936 (Com. Ex. 1089). It was also one of the bidders (with five others) on a joint bid for Boulder Dam project (Com. Ex. 134-C).

(See also: As to pricing, Tr. 8957-9; 14803-24; 28786-8; 38947-8; as to trucking, Tr. 8964; 8942; Com. Ex. 971-10L; 976-14R; as to dealer policies, Resp. Ex. 1745; 1758; 2977; as to meetings, and communications, Com. Ex. 1965-A, B; Tr. 8634-7; 8786.)

66. SPOKANE PORTLAND CEMENT COMPANY, hereafter referred to as "Spokane," with principal place of business at Spokane, Wash., was incorporated on February 5, 1937, under the laws of the State of Washington, at which time it effected the acquisition of the old Spokane Portland Cement Company, which was identical with the International Portland Cement Company, which name had been changed by charter. The original Spokane Portland Cement Company joined the Institute in June 1933, and paid dues through December 1936. The respondent company, the new corporation, without formal application for

membership in the Institute, paid the back dues of the acquired company and continued to pay dues for the months of May to September 1937, inclusive. It resigned from the Institute on March 1, 1938.

Spokane (the old company) was involved in identical bidding on February 21, 1935 (Com. Ex. 111-F).

(See also: As to trucking, Com. Ex. 967-2J.)

67. STANDARD PORTLAND CEMENT COMPANY, hereafter referred to as "Standard," is an Ohio corporation, organized in 1924, with principal place of business at Painesville, Ohio. It has one mill at Painesville, Ohio (Ans. Par. I; Tr. 3169).

Standard joined the Institute in June 1933 (Resp. Ex. 2173), and was involved in identical bidding as follows: January 18, 1935 (Com. Ex. 178-A), June 5, 1936 (Com. Ex. 373-A), and on July 21, 1936 (Com. Ex. 1089).

(See also: As to pricing, Tr. 14803-24; as to dealer policies, Resp. Ex. 1752; 1262-A; as to meetings, Com. Ex. 1965-A, B.)

68. SUPERIOR CEMENT CORPORATION, hereafter referred to as "Superior," has its principal place of business at Portsmouth, Ohio. The Wellston Iron Furnace Company was an Ohio corporation, organized in 1918, with its principal place of business at Portsmouth, Ohio. The name of the company was changed to Superior Cement Corporation in 1931. It went through reorganization in 1939 (Ans. Par. I; Tr. 29605; 29548-50). It has one mill at Superior, Ohio (Com. Ex. 3129).

Superior joined the Institute in 1930 or 1931 (Tr. 29604), and it was involved in identical bidding as follows: January 18, 1935 (Com. Ex. 178-A), June 5, 1936 (Com. Ex. 373-A), and on July 21, 1936 (Com. Ex. 1089).

(See also: As to pricing, 12245-8; 14803-24; as to trucking, Com. Ex. 967-D; as to dealer policies, Com. Ex. 1936; Resp. Ex. 1763; as to meetings, Tr. 9151).

69. SUPERIOR PORTLAND CEMENT, INC., hereafter referred to as "Superior Portland," is a Washington corporation organized in 1925 (Com. Ex. 3174-A), with principal place of business at Seattle, Wash. It operates two cement plants, one situated at Concrete, in Skagit County, Wash., which it owns, and the other at Seattle, Wash., which plant it operates under lease from the Pacific Coast Cement Company, (Tr. 8384-5, 42898).

Superior Portland sold and shipped cement from its said plants in the State of Washington to and into the State of Oregon on f.o.b. billing and ships to Alaska the same way. It sells in the State of Washington in competition with Beaver, Pacific, Santa Cruz, and other companies engaged in interstate commerce (Tr. 3222-7; 8383; 8434, 8461; 42892).

Superior Portland joined the Institute in June 1933 (Tr. 8382; 8444; 92895), and it was involved in identical bidding as follows: February 21, 1935 (Com. Ex. 111-F), and August 20, 1935 (Com. Ex. 112-D).

(See also: As to pricing, Tr. 8436-9; 8528-30; 8542-9; as to meetings, Com. Ex. 1199-A.)

70. THREE FORKS PORTLAND CEMENT COMPANY, hereafter referred to as "Three Forks," was incorporated under the laws of Montana on March 29, 1907. Its principal office is at Denver, Colo., and branch offices are maintained at Butte, Mont. The company sells the output of a cement mill located at Trident, Mont., which mill is owned and operated by Ideal Cement Company, a Colorado corporation (Ans. Par. I; Tr. 47642).

Three Forks joined the Institute on June 15, 1933 (Resp. Ex. 2173; Com. Ex. 1033-C), and it was engaged in identical bidding as follows: June 5, 1934 (Com. Ex. 166), May 10, 1934 (Com. Ex. 165), and on July 25, 1935 (Com. Ex. 168-A).

(See also: As to pricing, dealer policies, trucking, etc., Arkansas, and others of the Boettcher chain; as to meetings, Com. Ex. 2242-7.)

71. TRINITY PORTLAND CEMENT COMPANY, hereafter referred to as "Trinity," is a West Virginia corporation organized in 1908 or 1909, with its principal place of business at Chicago, Ill. (Tr. 13337-38). It has cement mills at Dallas, Fort Worth, and Houston, Tex. (Tr. 47579).

Trinity joined the Institute in June 1933 (Tr. 13369-72; Resp. Ex. 2173), and was involved in identical bidding as follows: April 23, 1936 (Com. Ex. 175-A), August 30, 1937 (Com. Ex. 180-A), and on September 9, 1937 (Com. Ex. 123-D).

(See also: As to pricing, Tr. 47613, et seq.; as to meetings Com. Ex. 1131-J; 3005-A; as to trucking, Com. Ex. 867-17G; as to dealer policies, Com. Ex. 2369-A, B.)

72. UNION PORTLAND CEMENT COMPANY, hereafter referred to as "Union," was incorporated under the laws of Utah on February 24, 1906 (Tr. 47645; Com. Ex.

3176-II-LL). Its principal office is at Denver, Colo., with branches at Ogden and Salt Lake City, Utah. The company sells the product of a cement mill at Devil's Slide, Utah, owned and operated by Ideal Cement Company (Tr. 13841-43; 47645).

Union joined the Institute on June 15, 1933 (Resp. Ex. 2173; Com. Ex. 1033-C), and was involved in identical bidding as follows: Invoices of April 5, 1938, April 7 and April 8, 1938 (Com. Ex. 2750, invoices 5, 6, 7, 9) to dealer in Salt Lake City; identical bids on these same items were made by Portland Cement Company of Utah (Com. Ex. 2703), and Monolith Portland Midwest Company (Com. Ex. 2722). Union also made a joint bid with five others on the Boulder Canyon project (Com. Ex. 134-C).

(See also: As to pricing, trucking policy, etc., Arkansas, and others of the Boettcher chain; as to meetings, Com. Ex. 2242-7.)

73. UNIVERSAL ATLAS CEMENT COMPANY, hereafter referred to as "Universal," was originally called Universal Portland Cement Company, which company was incorporated under the laws of the State of Indiana on October 1, 1906; it changed its name on or about January 1, 1930 to "Universal Atlas Cement Company" (Tr. 34760-61). Its principal place of business is at Chicago, Ill. (Com. Ex. 3141-B). This company has cement manufacturing plants at Buffington, Ind.; Universal, Pa.; Duluth, Minn.; Northampton, Pa.; Leeds, Ala.; Hannibal, Mo.; Independence, Kans.; Waco, Tex.; and Hudson, N. Y. (Tr. 34759). The original plants of Universal Portland Cement Company were those at Buffington, Ind.; Universal, Pa.; and Duluth, Minn. The other six were acquired immediately before the change of corporate name and were plants which had formerly belonged to the Atlas Portland Cement Company (Tr. 34760-61).

Universal joined the Institute June 15, 1933 (Tr. 34768; Resp. Ex. 2173-A to E; 34767).

Universal was involved in identical bidding as follows: June 5, 1934 (Com. Ex. 166); January 18, 1935 (Com. Ex. 178-A), July 25, 1935 (Com. Ex. 168-A), September 8, 1936 (Com. Ex. 303-D), and on eleven other occasions during 1936. (Com. Ex. 175-A; 373-A; 2493; 2495; 2496; 2498; 2501; 2503; 2505; 2595; 2507), and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 4025-45; 14803-24; as to trucking, Com. Ex. 967-15B, 11A; 975-14J, 2V; as to dealer

policies, Resp. Ex. 1748; 1760; 1461; as to meetings, Tr. 569; 573; 583; Com. Ex. 20-A to C; 45-A; 1496-A; 2370-A, B; 3005-A; Tr. 11529-33).

74. VALLEY FORGE CEMENT COMPANY, hereafter referred to as "Valley Forge," is a Pennsylvania corporation organized in 1927, with its principal place of business at Catasauqua, Pa. It is engaged solely in the production of cement and all of its output is marketed by the Allentown Portland Cement Company (Tr. 10521, et seq.; Com. Ex. 3149-A to F; 3138-A to D).

Valley Forge has never been listed as a member of the Institute but ALLENTOWN PORTLAND CEMENT COMPANY, selling agency for Valley Forge, joined the Institute in 1929 (Com. Ex. 135-1). Both Allentown Portland Cement Company and Valley Forge Cement Company, with Allentown Portland Cement Company in parentheses under Valley Forge Portland Cement Company, are shown on Com. Ex. 1033-D, which bears heading "Members of the Cement Inst. 3/15/37." (See Ans. Par. III; Tr. 10520-8.) All of the directors of Valley Forge are also directors of Allentown, and all of the officers of Allentown are the corresponding officers of Valley Forge. (Compare Com. Ex. 3138-A with 3149-A.)

Allentown Portland Cement Company was involved in identical bidding as follows: September 6, 1935 (Com. Ex. 372-A), and on May 29, 1936 (Com. Ex. 1099-R).

(See also: As to pricing, Tr. 14803-24; as to Allentown dealer policies, Com. Ex. 1429-A; Tr. 10528; as to meetings, Com. Ex. 385-A; Resp. Ex. 1353; 3235-Z82; Tr. 25045-8; 27049-54).

75. VOLUNTEER PORTLAND CEMENT COMPANY, hereafter referred to as "Volunteer," is a Delaware corporation having its principal place of business at Knoxville, Tenn. It was organized in 1927 and began operating in 1928 (Tr. 38605-06; 38625-26; 31373-85; Resp. Ex. 2188). It operates one cement plant located just outside of Knoxville, Tenn. (Tr. 31380).

Volunteer joined the Institute in November 1929; it resigned December 1, 1930 (Resp. Ex. 2928-A, B; 2929; Tr. 38649-52). It rejoined the Institute in June 1933 (Resp. Ex. 2930-A to C; 2931; Tr. 38652-62; 31935-36; 31848-49; 31853-64).

This respondent was involved in identical bidding as follows: June 16, 1936 (Com. Ex. 1096-A), August 24, 1936 (Com. Ex. 1090), and on August 30, 1937 (Com. Ex. 180-A).

(See also: As to pricing, Tr. 5069-85; 31903-42; as to trucking, Com. Ex. 976-10-I; 971-14P; as to meetings, Com. Ex. 1131-J).

76. VULCANITE PORTLAND CEMENT COMPANY, hereafter referred to as "Vulcanite," is a New Jersey corporation organized October 13, 1895, with principal place of business at Philadelphia, Pa. It has a sales office in New York, and a plant at Vulcanite, N. J. (Ans. Par. I; Com. Ex. 3128), but it sold quantities of cement manufactured for it by Hercules and shipped from the latter's plant (Tr. 10545-6; 10568-71).

Vulcanite joined the Institute in August 1929, but subsequently resigned. It rejoined the Institute on June 15, 1933 (Com. Ex. 136-A; Resp. Ex. 2173; Tr. 48106-07). It was involved in identical bidding as follows: September 6, 1935 (Com. Ex. 372-A), and on May 18, 1937 (Com. Ex. 387-H).

Vulcanite sells and ships cement from its aforesaid plants and locations to and into the States of New York, Maryland, Ohio, and elsewhere outside of the States of origin (Com. Ex. 3128-A to L; Tr. 10545-6).

(See also: As to pricing, Tr. 14803-24; as to dealer policies, Tr. 10545; Resp. Ex. 1458; as to meetings, Com. Ex. 3235-Z108).

77. WABASH PORTLAND CEMENT COMPANY, hereafter referred to as "Wabash," is an Indiana corporation organized in 1899, with principal place of business at Detroit, Mich. It has two mills, one at Osborn, Ohio, and the other at Stroh, Ind. (Ans. Par. I; Tr. 47649).

Wabash belonged to the Institute from January 1930, to November 11, 1930. It rejoined the Institute in June 1933 (Com. Ex. 136-2B; Resp. Ex. 143; Com. Ex. 606-H), and it was involved in identical bidding as follows: January 18, 1936 (Com. Ex. 178-A), March 23, 1933 (Com. Ex. 1128-H), and on June 5, 1936 (Com. Ex. 373-A).

(See also: As to pricing, Tr. 14773, et seq.; 14803-24; as to dealer policies, Resp. Ex. 1753; 1767; as to meetings and communications, Com. Ex. 20-A to C; 45-A; 1965-A, B; 3235-Z82; Tr. 559; 573, 583.)

78. WEST PENN CEMENT COMPANY, hereafter referred to as "West Penn," is a Pennsylvania corporation organized in 1926, with principal place of business at Butler, Pa. It began operations in 1927. It has one mill at West Winfield, Pa. (Com. Ex. 3134-A).

West Penn joined the Institute shortly after its forma-

tion in 1929 (Tr. 27720; 27751-52; 27830-32; 27836; 27845; 27862). It was involved in identical bidding as follows: January 18, 1935 (Com. Ex. 178-A), June 5, 1936 (Com. Ex. 373-A), July 21, 1936 (Com. Ex. 1089), and on May 18, 1937 (Com. Ex. 387-H).

(See also: As to pricing, Tr. 14803-24; 27860-82; as to trucking Com. Ex. 970-L; as to meetings, Com. Ex. 1364).

79. WHITEHALL CEMENT MANUFACTURING COMPANY, hereafter referred to as "Whitehall," is a Pennsylvania corporation organized in 1911, with its principal office in Philadelphia, Pa. It has one mill located at Cementon, Pa., in the Lehigh Valley (Com. Ex. 3164-B; Ans. Par. I; Tr. 28473-74; 28517).

Whitehall joined the Institute June 15, 1933 (Tr. 28481; 28520-22; 28525; 28633; 28702-03; Resp. Ex. 1628; 1629; 2173). It was involved in identical bidding as follows: June 29, 1936 (Com. Ex. 9-C), May 29, 1936 (Com. Ex. 1099-R), and May 18, 1937 (Com. Ex. 1099-W).

(See also: As to pricing, Tr. 14803-24; 28660-80; as to meetings, Com. Ex. 1131-J).

80. WOLVERINE PORTLAND CEMENT COMPANY, hereafter referred to as "Wolverine," is a Michigan corporation organized in 1900, with principal place of business at Coldwater, Mich. It has two plants, one at Coldwater, Mich., and one at Quincy, Mich. (Ans. Par. I; Tr. 35893-94).

Wolverine joined the Institute June 15, 1933 (Tr. 35922; Com. Ex. 136-2B; Resp. Ex. 2639; 2173). It was involved in identical bidding as follows: December 17, 1931 (Com. Ex. 1864) and on April 23, 1929 (Com. Ex. 1877).

(See also: As to pricing, Tr. 13561-6; 35902-6; as to dealer policies, Resp. 1755-6; Com. Ex. 2412; as to meetings, etc., Com. Ex. 45-A; 1496-A to C; 1965-A, B; Tr. 11529-33).

81. YOSEMITE PORTLAND CEMENT CORPORATION, hereafter referred to as "Yosemite," is a Delaware corporation, incorporated in 1924, with principal office in Merced, California. It operates one plant situated near Merced, Calif. (Tr. 42844).

Yosemite joined joined the Institute June 15, 1933 (Resp. Ex. 2173-A to D). It was involved in identical bidding as follows: June 26, 1934 (Com. Ex. 1099-D), December 28, 1935 (Com. Ex. 1212-A), and May 3, 1937 (Com. Ex. 120-B).

(See also: As to pricing, Tr. 8615-19; 8726-37; 42846; as to dealer policies, Tr. 8741).

82. The foregoing individual references to particular respondents contain some of the facts which go to identify each with the activities of the Institute, and with other group activities. Additional references to these respondents and further details of their activities will appear throughout the remainder of the report. Because of the mass of material produced and received for these studies, it is not practicable to refer to all material on a given subject. Throughout this report sufficient references, only, are given to furnish bases for findings which your examiner deems abundantly supported by the weight of the evidence contained in the entire record.

Interstate Commerce.

83. All of the aforesaid respondents, except as heretofore affirmatively appears, sell and ship their products from their various plants in the States and Territories set out above to locations in States and Territories other than those of origin in a constant stream of trade and commerce (Answers: See also Pars. relating to Castalia, Great Lakes, Northwestern, Oregon, Superior Portland, Valley Forge and Vulcanite, supra).

Facts of the Cement Industry.

84. Cement, ordinarily termed "Portland Cement," is a construction or building material made from limestone and shale and sold in the form of powder which hardens into stone when mixed with water. The raw materials are mined from quarries and processed in large plants or mills requiring a capitalization of 50c to $1.00 per barrel of annual capacity. In the sale of cement the transportation charges range between 3 and 33% of the cost to consumers (Tr. 500-4; Com. Ex. 2792; Tr. 22514-16; Tr. 22531, et seq.).

The total production of cement for the entire country, as reported by the United States Bureau of Mines, varied from 100,023,245 barrels for 1920 to 176,298,846 barrels in 1928, but decreased thereafter to 63,473,189 barrels in 1933, and increased to 116,174,708 barrels in 1937 (Resp. Ex. 3488-A to D).

85. There are about 90 cement manufacturers operating about 150 mills in the United States, and these are located in widely separated portions of the country, including the States of Pennsylvania, California, New York, Illinois, Michigan, Ohio, Missouri, Texas, Iowa, Kansas, Tennessee,

and Alabama. It is also produced in Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, New Jersey, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming (Answers; Resp. Ex. 3764-A to G; Com. Ex. 1; 2; Tr. 51-5; 4266).

86. Cement is used for buildings, highways, bridges, foundations and other construction purposes (Tr. 22516; 22521). It is sold to the Federal and State Governments, to contractors, to concrete mixing plant and building supply dealers on the unit basis of one barrel of 376 pounds net, or 380 pounds including sacking. A barrel is usually shipped in four paper or cloth sacks. The manufacturer usually sells not less than a minimum carload to any of these customers. There are approximately thirty thousand building supply dealers in the United States, and these purchase from the manufacturers and resell the larger portion of the cement sold (Tr. 4266; 22516; 22521).

87. Cement is a commodity of seasonal demand which varies in its requirements for surplus production (Com. Ex. 553-3A). The material from which it is manufactured is mined from quarries. Deposits of this raw material, sufficient for making ordinary cement, can be found in almost all sections of the country and plant locations are influenced to a considerable extent by market and pricing considerations (Com. Ex. 553-3A, 3rd par., 2Z to 3E), but there are various grades and kinds of rock required for different qualities of cement, and there are various working qualities in the material which also enter into the problem of plant location (Tr. 22531-3; 22550-98; 34673-4).

Demand for cement is inelastic so far as it comes from building operations and construction requiring a small proportion of its material to be of cement. In some buildings the percentage of cement to other structural material would be small but in other buildings, roads, concrete bridges, etc., the cement requirement is often much larger (Tr. 47544-64). Cement in some cases is in competition with brick and other building materials (Tr. 15512; 47555, et seq.).

The Basing Point System.

88. The multiple basing point system shown throughout the record to have been employed by respondents in

all trade territory outside of areas or zones of arbitrary or flat prices, hereinafter mentioned, involves the quoting of delivered or destination prices only, which prices are the product of a base price and rail freight charges from some basing point to the destination. All mills are not basing points. Only those are found to be such whose quoted prices at two or more points are disclosed by the subtraction of the different freight charges to reflect a constant figure or base price (Tr. 5017; 5123; Resp. Ex. 3743-A to 3755-B; Tr. 28015; 36812; 38748).

89. The governing price at a given destination is the lowest combination of base price plus freight. Approximately one-third of the mills operated by respondents are regarded as basing points, but a mill may be or not be a basing point at any given time. Mills change from basing point to non-basing point mills, and vice versa. Such changes may be discovered by other mills through analysis of the announced prices of the mill making the change and the application of the basing point factors (Tr. 374; 387; 5049; 9125; 13590-600).

90. Basing point mills receive a uniform mill net (gross delivered price less freight) in territory where said net plus freight is the lowest or controlling price. In selling beyond this territory a basing mill merely meets the prevailing price at a given point. This invariably shrinks mill net by reason of the absorption of a greater amount of freight than would be included in prices controlled by its own base. The basing mill, therefore, makes its highest net in the territory controlled by its base. Beyond this, the net diminishes with the increase of transportation costs until it reaches a point where it is not profitable to make shipments (Tr. 5024-44; 5127; 6019-43).

91. Non-basing mills simply meet the prices they find at all destinations where they consider it desirable to sell, but they employ the basing point method and formula for quotations to points where they have not found competitors' prices. That is, if they find several prices in a given territory reflecting a particular base price at a particular point, they then apply the formula of base plus freight from the controlling mill for quoting all other points in the territory (Tr. 5127; 13595-600). Once the constant factor is determined, the operation involves nothing more than adding the freight factors.

Non-basing mills receive their highest nets from sales in their immediate vicinity where the absorbed or paid

freight is negligible while the freight tariff from the basing point to the destination is considerable. They therefore have mill nets equal to the controlling mill's base price plus the rail freight charge from that mill less the small amount of freight actually paid. The non-basing mill would therefore receive as part of its net "phantom freight," or freight which was included in the price, but not paid. In such cases the consumer pays the freight but the transportation companies do not receive it.

As indicated, the non-basing mill does not reduce the price by reason of the freight saving, but charges the price quoted by the controlling base for shipments from its mill to the vicinity of the non-basing mill. In this way a system of delivered prices is maintained which are uniform at given destinations as between all competing mills. The extra price obtained on nearby business by non-basing mills enables them to balance sales and output by absorbing greater amounts of freight on shipments to distant points (Supra, Com. Ex. 553-2X, 2Z; 2850-A to D; 3128-G; Tr. 6019 et seq.).

92. This basing point pricing method is so generally observed in the cement industry that producers base their calculations on the assumption that all prices outside of zoning areas conform to the pattern. On such assumption or understanding they figure back, by deducting known freight from several basing or shipping points, and determine, as heretofore explained, the mill and the constant price figure which governs in a given territory (Tr. 381; 447-8; 5017-23, et seq; 5121-4; 5127; 6019-43; 8085-6; 10557; 13528-9; 14590; Com. Ex. 553-2X, 2Z; 1032-D to F; 2850-A, D; 3128-G; 3743-A to 3755-B).

Respondents apply this method, or system, in the process of "meeting competition," as many witnesses expressed it, or "matching prices," as others refer to it. The settled philosophy and policy in the trade, as revealed by many witnesses and documents hereafter cited, is:

(a) that a vendor cannot get more for his cement than his competitor charges (Tr. 8252; 6761-2);

(b) that he should not take less (Tr. 6183; 6211; 6761-2; 13694-7; Com. Ex. 122-B);

(c) that underselling below one's published prices is unethical (Tr. 6194; 6635; 8024; 12693);

(d) that cut prices (or quotations below their own published or announced prices) are always met by competitors and the practice often leads to price wars (Tr. 13703; 26909);

(e) that the lowering of prices does not increase sales volume (Tr. 34329; 36762; 43058-61);

(f) that competition forces them to pursue uniform policies that will prevent price cutting by dealers as against each other (Tr. 7697; 38756; 38962);

(g) that f. o. b. mill quotations for undisclosed destinations should not be made (Tr. 4330; 6668; 4864; 6677);

(h) that they should not reduce prices or give trade discounts on large quantities sold to the U. S. government or others (Com. Ex. 1174-K; Tr. 6634; 4530), and

(i) that delivery to customers' trucks at the mill on an f. o. b. mill basis and diversions of shipments in transit disrupts competitive, or price matching, conditions and should not be permitted (Tr. 6114; 7284; 11068-87; 11430; 14643; Com. Ex. 970-3-H).

Prevailing Trade Conditions.

93. From the use of the basing point method and the application of the foregoing principles in various stages of its development from 1910 and earlier to July 2, 1937, the date of the complaint, the following conditions developed in the cement trade:

(a) Prices quoted dealers and consumers at given destinations and times were identical. There were occasional secret price cuts and deviations for special job contracts, but for the most part identical prices prevailed throughout the trade, both in the flat price zones and in the larger territory where the quotations conformed to pattern (Tr. 395-424; 4045; 4805; 6155-6; 6183; 7651; 7760; 7910; 7943; 7953; 8034; 8075; 8078; 8162; 13694; Com. Ex. 1945). (See also Ex. 2631 to 2802 for comparative prices.)

(b) All important terms and conditions of sale extended by respondents were identical at a given time. These included discounts, returned sack allowances, freight payment arrangements, price protection, contract conditions, sales to dealers, sales to the United States Government, deliveries to trucks, diversions in transit, discounts for quantity, and f. o. b. mill quotations (Tr. 2408; Com. Ex. 461; 1936; 2135; 2124; Tr. 37; 5233-38; 4587; 23466).

(c) Respondents' practices were identical in the matter of broadcasting prices to the trade and checking competitors' prices similarly communicated. Changes of pol-

ley were similarly announced, checked and uniformly adopted (Resp. Ex. 1855; 1660, et seq.; Tr. 6643; 6644; 7903, et seq.; 23466; 38960; infra).

(d) Cement could not ordinarily be bought when the destination or point of use was not specified (Tr. 4330; 4864; 6668; 6677).

(e) No savings could be made by purchasers through the use of trucks or other means of transportation less expensive than rail (Com. Ex. 970-4L; 277-L; Tr. 4587).

(f) Savings through diversions in transit could not be made (Tr. 7973; 7966, infra).

(g) No advantage in price could be obtained by reason of proximity to a cement mill (infra).

(h) No cement could be bought by ordinary consumers from any but local dealers (Tr. 4979; 7697).

(i) Prices remained stationary for long periods of time (See Par. on "Price Rigidity," infra).

(j) Price changes were made by broadcasting them to the trade through printed and written announcements. Price reductions were made retroactive five days, that is, all shipments billed at the old price during the five days preceding the effective date of the reduction were rebilled at the new, reduced price. Reductions were usually made effective at once. Price increases were usually made to take effect five days after the announcement, and if no further announcements were made indicating that competitors would make a similar increase, the price was withdrawn. In case a price increase was followed by all competitors, it remained in force but all dealers were permitted to order at the old price any quantity for stock for which they would take delivery within fifteen days (Tr. 6312 to 6319; Resp. Ex. 3743-A to 3755-B).

(k) Contracts for furnishing cement for specific jobs were let at a given price with a guarantee that if prices to the trade were reduced the contract price would also be lowered (Resp. Ex. 2358; 2822; Com. Ex. 561; see also generally as to trade practices under criticism, Com. Ex. 553-X to 2C). (See also Com. Ex. 553-2Z to 3E.)

(l) Mills found delivered prices such as to enable them to absorb freight and make shipments into and beyond the territory adjacent to other mills (Tr. 5010; 5063; 5084; 5091; 6128; 6184-7; 7150-1; 34574, et seq.; 41892-3). Freight absorption of 53¢ per barrel, accepted by Dewey, was taken by Mr. Crapo, of Huron, to indicate that the delivered price was too high (Tr. 11115-8).

(m) Prices generally were figured on rail freight rates although many shipments were made by cheaper transportation such as water or truck (Tr. 7277; 8613; 9127-11042-8; 11973; Pars. 120-9, infra; Pars. 7 to 81, supra).

Identical Bidding

94. As heretofore indicated in references to individual respondents, identical bidding on proposals for the purchase of cement by the United States Government and others was the outcome of many lettings and the occasion of much complaint on the part of Government purchasing agents and officials (Tr. 129; 236; 345; 395; 1118; 1173; 1969; 2295; 9973). During the Code period the price filing provisions rendered it unlawful for bidders to quote lower than their filed prices (Com. Ex. 557, p. 336). To meet this and secure bids at varying prices on Government purchases the President, on June 20, 1934, issued an executive order permitting variations of 15% below filed prices on bids to the United States, to States, or to other public authorities (Com. Ex. 179). This "tolerance order" was not taken advantage of and the principle of a 15% variation was rejected by 92% of the Code membership (Tr. 3358). It was objected to as a "continued threat of defeating the purpose of the open shop plan," and would permit the bidding of all sorts of prices on Government jobs (Tr. 3359-61); (See also "Price Filing," infra).

On occasions when a company would make a miscalculation and bid lower than its competitors, whose prices followed the basing point pattern, it requested such bid to be withdrawn or changed to the group figure (Com. Ex. 2818; 1126-C to H; 1848; Tr. 6394; 6680; 11634-5; 19655-6). Companies would sometimes bid higher than the group figure on business they did not wish to contest for. This was done in order to hold their places on purchasers' lists (Tr. 6400-14; 36621-3).

Following are details and examples of identical bidding at various times as charged in the complaint:

95. On June 5, 1934, Respondents Lehigh, Ash Grove, Dewey, Huron, Penn-Dixie, Three Forks, Universal, Northwestern States, Marquette, and Hawkeye, submitted bids to the War Department for furnishing 600,000 barrels of cement to be used in the construction of a project for the United States at Fort Peck, Mont. As shown by the abstract of bids (Com. Ex. 166), each of the afore-

said respondents bid the identical amount of $2.7054 per barrel (Tr. 1633-1635).

96. On July 25, 1935, Respondents Universal, Huron, and Three Forks, submitted bids to the War Department for furnishing 600,000 barrels of cement to be used in the construction of a project for the United States at Fort Peck Reservoir (Missouri River Div., Kansas City). As shown by the abstract of bids (Com. Ex. 168-A), each of the aforesaid respondents bid the identical amount of $2.5054 per barrel (Tr. 1526-7).

97. On April 23, 1936, Monarch, Ash Grove, Lehigh, Southwestern, Oklahoma, United States Portland, Consolidated, Trinity, Lone Star, Universal, and Colorado submitted bids to the War Department for furnishing 6,000 barrels of cement to be used in the construction of a project at Tucumcari, N. M. As shown by abstract of bids (Com. Ex. 175-A), each of the aforesaid respondents bid the identical amount of $3.286854 per barrel (Tr. 1565; 1566).

98. On September 6, 1935, Universal, Lone Star, Lehigh, Medusa, Coplay, Allentown, Vulcanite, Lawrence, Alpha, Nazareth, and Keystone, submitted bids on 264 barrels of cement to the Department of Justice for U. S. Northeastern Penitentiary, Lewisburg, Pa. As shown by abstract of bids (Com. Ex. 372-A), each of the aforesaid respondents bid the identical amount of $2.29 per barrel (Tr. 2830-7).

99. On June 5, 1936, Alpha, Green Bag West Virginia, South-Western, Standard, Universal, Medusa, Pittsburgh Plate Glass, West-Penn, Bessemer, Lehigh, Superior, Louisville, Diamond, and Wabash submitted bids to the Department of Justice for U. S. Industrial Reformatory, Chillicothe, Ohio, on 500 barrels of cement. As shown by abstract of bids (Com. Ex. 373-A), each of the aforesaid respondents bid the identical amount of $2.02 per barrel (Tr. 2390-1).

100. On September 8, 1936, Green Bag Pennsylvania, Universal North American, Capitol, Edison, Medusa, Penn-Dixie, Alpha Hercules, Keystone, Nazareth, Coplay, Lone Star, Lehigh and National Building Supply Company submitted bids to the War Department for Fort George G. Meade, Md., on project requiring an indefinite quantity of cement. As shown by abstract of bids (Com. Ex. 303-D), each of the aforesaid respondents bid the identical amount of $2.30 per barrel (Tr. 1690; 6920).

101. Below is a tabulation of bids to the State Highway Commission (Oklahoma) covering cement purchases from January 1, 1936, to September 1, 1936:

STATE HIGHWAY COMMISSION (OKLAHOMA)

TABULATIONS OF BIDS ON CEMENT PURCHASED FROM JANUARY 1, 1936 TO SEPTEMBER 1, 1936

Date	Amount (in bbls.)	Bidders	Destination	Price	Bid
1-6-36	450	Ash Grove	Boise City	$3.03	$1,363.50
		Monarch		3.03	1,363.50
		Universal		3.03	1,363.50
		Dewey		3.03	1,363.50
		Oklahoma		3.03	1,363.50
3-8-36	2250	Dewey	Clayton	2.72	6,120.00
		Universal		2.72	6,120.00
		Monarch		2.72	6,120.00
		Ash Grove		2.72	6,120.00
		Consolidated		2.72	6,120.00
		Oklahoma		2.72	6,120.00
3-12-36	132 (in paper)	Oklahoma	Waynoka	2.55	336.60
		Universal		2.55	336.60
		Monarch		2.55	336.60
		Lehigh		2.55	336.60
		Ash Grove		2.55	336.60
3-8-36	175 (in paper)	Ash Grove	Perry	2.42	423.50
		Oklahoma		2.42	423.50
		Monarch		2.42	423.50
3-25-36	150	Dewey	Alva	2.77	415.50
		Ash Grove		2.77	415.50
		Universal		2.77	415.50
		Oklahoma		2.77	415.50
		Monarch		2.77	415.50
		Lehigh		2.77	415.50
4-9-36	450	Ash Grove	Boise City	3.03	1,363.50
		Monarch		3.03	1,363.50
		Dewey		3.03	1,363.50
		Oklahoma		3.03	1,363.50
		Consolidated		3.03	1,363.50
4-10-36	390	Dewey	Cyril	2.87	1,119.30
		Oklahoma		2.87	1,119.30
		Monarch		2.87	1,119.30
		Ash Grove		2.87	1,119.30
		Consolidated		2.87	1,119.30
		Lehigh		2.87	1,119.30

TABULATIONS OF BIDS—Continued

Date	Amount (in bbls.)	Bidders	Destination	Price	Bid
4-18-36	132	Dewey	Buffalo	$2.86	$ 377.52
		Ash Grove		2.86	377.52
		Oklahoma		2.86	377.52
		Monarch		2.86	377.52
		Universal		2.86	377.52
		Consolidated		2.86	377.52
5-16-36	200 (in paper)	Oklahoma	Perry	2.42	484.00
		Dewey		2.42	484.00
		Ash Grove		2.42	484.00
		Universal		2.42	484.00
		Monarch		2.42	484.00
6-20-36	750	Ash Grove	Boise City	3.03	2,272.50
		Monarch		3.03	2,272.50
		Dewey		3.03	2,272.50
		Oklahoma		3.03	2,272.50
		Universal		3.03	2,272.50
7-1-36	132	Ash Grove	Buffalo	2.86	377.52
		Oklahoma		2.86	377.52
7-8-36	350	Ash Grove	Apache	2.82	987.00
		Monarch		2.82	987.00
		Oklahoma		2.82	987.00
		Dewey		2.82	987.00
		Universal		2.82	987.00
		Lehigh		2.82	987.00
		Consolidated		2.82	987.00
8-22-36	900	Oklahoma	Stilwell	2.71	2,439.00
		Lehigh		2.71	2,439.00
		Ash Grove		2.71	2,439.00
		Universal		2.71	2,439.00
		Consolidated		2.71	2,439.00
		Dewey		2.71	2,439.00
		Monarch		2.71	2,439.00
		Lone Star		2.71	2,439.00

NOTE: All cement in cloth except as otherwise specified. (Com. Ex. 2493; 2495; 2496; 2497; 2498; 2499; 2500; 2501; 2503; 2505; 2506; 2595; 2507, respectively.)

102. On August 30, 1937, Penn-Dixie, Arkansas, Universal, Cumberland, Trinity, Signal Mountain, Alpha, Lehigh, Lone Star, Monarch, National, Consolidated, Volunteer, Georgia, and Hermitage, submitted bids on 1200 barrels to the War Department for project at Vicksburg, Miss. As shown by abstract of bids (Com. Ex. 180-A), each of the aforesaid said companies bid the identical amount of $2.31 per barrel (Tr. 1583-4).

103. On January 18, 1935, Southwestern, Bessemer, Universal, West-Penn, Lehigh Standard, Diamond, Wabash, Superior, Coplay, Alpha, Washington, Bldg. Lime, Huron, Medusa, Lawrence, Green Bay, Pennsylvania, and Pittsburgh Plate Glass, submitted bids on 1,200,000 barrels to the War Department for Tygart River Reservoir Dam, Pittsburgh, Pa. As shown by abstract of bids (Com. Ex. 178-A), each of the aforesaid companies bid the identical amount of $1.84 per barrel (Tr. 1570).

Involuntary Basing Mills.

104. In connection with the general use of the basing point method, it happened occasionally that a mill or mills established a base at a competing mill's location. This limited the net of the involuntary base mill to the figure chosen by its competitors, and when this was too low for profit the mill suffered serious financial loss. This happened on occasions where the involuntary base price was the same as a cut price theretofore made by the sufferer in violation of what was regarded as the ethics of the basing point system (infra).

Following are some of the cases of basing points being imposed on mills without their consent and contrary to their wishes:

105. During the latter part of 1927 the Warrior Cement Company, which operated a plant at Spocari, Ala., made some prices which were lower than the prevailing prices in their territory based on Birmingham, Ala. Lone Star then quoted in the Spocari territory prices based on Warrior's mill, using the mill net of the latter's cut price as the new base price at Spocari. This had the effect of preventing Warrior from ever receiving a greater mill net than it had from the offending cut price. Lone Star kept this low base at Spocari until April 1928, when it acquired the Warrior mill. This mill was especially favored as to easily workable stone and low transportation rates (Tr. 6682-93; 34673-4; Com. Ex. 975-4X to 5B, 5U; 1274-A to F). The Spocari mill was regarded as an outlaw mill (Com. Ex. 1274-A to F). The Spocari plant was underselling to the extent of giving customers a freight advantage which it deducted from open quotations based on North Birmingham (Com. Ex. 975-5U, 6-O, 5K). This base was put in December 5, 1927, and the mill was acquired by Lone Star on April 28, 1928 (Com. Ex. 5-K and supra, but see Tr. 6684).

106. In March, 1933, Aetna secured a contract for 150,000 barrels from the State of Indiana on a bid which was lower than those of its competitors because it was figured on the Wyandotte, Mich., base, instead of Toledo, Ohio. It was the general understanding and prior practice for the Wyandotte base not to be used except in figuring prices to Michigan points. In the same month Aetna underbid its competitors 2 cents or more per barrel on the Muskegon-Holland, Mich., job (Tr. 540-6). Criticisms and protest against these bids were made by Aetna's competitors, Mr. Jennings, of Wabash, Fred Stone, of Universal (Tr. 547), and others (Com. Ex. 20-A to C).

Between the time of these transactions and April 11, 1933, Huron sent out quotations reflecting a base price of $1.40 per barrel at Aetna's Saginaw-Bay City, Mich., plant, where Huron had just established silo distribution (Com. Ex. 18; 19; Tr. 541-9). Shortly afterwards Wabash sent out quotations, figuring $1.25 at this base, and on April 17, 1933, the base was reduced to $1.15 (Tr. 14; 774; 553; Com. Ex. 18; 19). Wabash, it appears, came in because it understood that Aetna had taken some business in Indiana for which Wabash had secured a contract (Com. Ex. 418-A, B; Tr. 629). This action of placing a base on Saginaw-Bay City was retaliatory—a "war measure"—and had the effect of causing loss to Aetna without proportionate profit to those who limited the price and imposed the base on the competitor's mill (Tr. 944-86; Com. Ex. 418-A to F; see also Com. Ex. 417-D to U). This base was raised by stages to $1.55 and thereafter a flat price for Michigan was put in. F. R. Johnson, president of Aetna, protested against this involuntary base (Com. Ex. 18; 19; see also Tr. 636).

107. In April 1931 Lehigh quotations had the effect of placing an involuntary base on the plant of Ash Grove at Louisville, Nebr., which reduced Ash Grove's earnings from 25c to 60c per barrel (Tr. 13582 to 13608). President L. T. Sunderland, of Ash Grove, made protests to Colonel Young, of Lehigh, whose answer was not satisfactory to Mr. Sunderland, who made further statements and protests that the practice of placing a base on a competitor's mill was vicious and contrary to law and ethics (Tr. 13607-8; 13398; 13001; 12836-7; see Com. Ex. 971-15A; 2241; 2248; 2250; 2257). Lehigh quotations during 1931 also reflected an involuntary base on Dewey's plant at Aida, Okla. of $1.00 to $1.03 (Tr. 12511; 12998; Com. Ex. 971-15A).

108. Price cuts by Southwestern, Wabash, and Pittsburgh Plate Glass in the early part of 1931 brought quotations from Alpha and Lehigh reflecting base prices of $1.06 (stripped) at Pittsburgh Plate Glass's mill, Fultonham, Ohio, at Southwestern's mill, Osborn, Ohio, and at Standard's mill, Painesville, Ohio (Tr. 11345-48). Alpha had no mill at these points but placed the bases at Osborn and Fultonham because there had formerly been quotations from mills located there that reflected the low figure. This was done on May 16, 1931. The low bases at these points were very objectionable and caused losses to the mills located there as well as to Alpha, the mill imposing them (Com. Ex. 970-15X, Y; Tr. 11345-8; 14760-80; 14825; Com. Ex. 2827; 970-3A to I, 4C, 4F, 9; Tr. 26905 (Lehigh also); 27282).

109. Prior to May 25, 1932, Louisville Cement Company had taken some contracts at nets lower than the prevailing price, and on May 11 1932, Kosmos underbid about 20c per barrel at several destinations in the Kentucky State Highway letting of that date. On May 25, 1932, Lehigh sent out quotations placing a base of 90c on Louisville's mill, at Speed, Ind., and on the Kosmos mill at Kosmosdale, Ky. This placed a low price limit on the two mills and reduced net earnings (Tr. 12400; 1447; 12995; 13209 to 13219; 26904; 27288; Com. Ex. 971-14U, 23N; 913-6H).

Alpha, on February 3, 1931, placed a base of $1.35 at Marquette's mill at Cape Girardeau. Alpha found that Marquette had been selling at delivered prices which produced mill nets at this point as low as $1.26 (Tr. 23286; 24587-88; 33234; Com. Ex. 971-30Z, 31A; 975-4G, 6P).

110. In 1926 Lehigh put in a base price at Rapid City, S. Dak., which lowered the price of the State-owned plant from 60c to 70c per barrel (Tr. 12743; 12992; 26905; Com. Ex. 971-23H et seq.; 976-4R; 1202-K. See also Com. Ex. 969-10-O). Lehigh made bases at other points (Tr. 26904, et seq.).

111. The practice of placing a base price on the mill of a competitor was understood by Diamond to be a disciplinary measure, since its report to Professors Clark and Burns contains the statement that its mill had not been made a basing point "because our marketing practices have always been ethical" (Com. Ex. 970-5D). This report also says: "Due to the attempt by the Alpha Company to establish ethical sales policies in this district, we have several times suffered serious losses as a result of their presumed tactics towards some of our competitors."

Mr. McCourtie, president of Trinity, on April 23, 1931, wrote Mr. Joseph S. Young, an official of Lehigh, acting as Chairman of a Portland Cement Association Committee; in part as follows:

"If one of the larger units in the industry—such as the one with which you are identified—can justify the broadcasting of quotations three or four hundred miles further from its mills than it ever heretofore has made either quotations or shipments, and to which territory it does not expect to make any shipments—the quotations being made simply for the purpose of compelling another manufacturer, legitimately and properly serving that territory, to sell his product at a much lower price than he otherwise would—then I can see no very good reason for maintaining an Association, nor to further attempt any active cooperation with such units.

"Frankly, I cannot make myself enjoy the idea of any other company giving away my money, not only without saying 'by your leave,' but without a commercial grievance of any kind against us that would in any sense justify such action" (Com. Ex. 1195-A, B).

112. Discussing Com. Ex. 817-G, a recommended plan for price enforcement, Mr. Young writes to Mr. Rader, vice president of this company, as follows:

"The basic principle upon which the plan is predicated is that force is the only practical stabilizer. What is meant by force, I presume, is price. As you know, I have always been firmly of the opinion that it is only through price control that stabilization can be accomplished and I agree wholeheartedly with the argument that the threat of general price reductions to meet lower competitive prices in the field is the only method that has yet been discovered to insure price maintenance.

"From a legal standpoint it seems clear that any company has a right to raise or lower its own base at will. Furthermore, it is equally clear that any competitor may cut prices in the field by imposing a new base or openly lowering an old one at a competitive mill on the assumption that the competitor quoting such prices has in reality reduced his own basing point price. Therefore no legal objection could be raised against the plan of making general reductions to meet either open or secret lower competitive prices in the field" (Com. Ex. 817-I, J).

113. The imposition of an involuntary base subjects the mill with the imposed base to a greater measure of loss than the imposing mill has to suffer. Thus the system is

a device by which price cutting can be localized (Tr. 15683; 15688; 15770). There is a difference between this and the bona fide meeting of the price made by a competitor; for in case of the imposed base the low price is continued beyond the occasion or necessity therefor, and often beyond the time when the offending competitor has sought to raise his price (Tr. 15635-8). The price effects shown to result from involuntary bases are not different from what would result from local price cutting, but the basing point pricing method renders it easy to penalize a competitor and automatically to set bounds to the operation and give notice to all other producers (Tr. 12994, et seq.; 15635-8; 15666-7; 15770-76; 15861-3, and citations supra). The limit which an involuntary base places on a mill affects all of its business, while the arrangement might affect only a part, or none, of the business of the mill imposing the base which need not sell any more cement at the low price than enough to maintain the low figure (Com. Ex. 1197-A, B). The imposing mill has other business not affected (Tr. 15635-8; 15770 to 15774; 6682-87). Hercules imposed a base on the mill at Conshohocken, Pa., June 3, 1931, to meet the effect of trucking from the Valley Forge plant (Com. Ex. 969-10-Q).

VII. Means Employed.

(a) Institute Rate Books.

114. As heretofore set out, respondents' quoted prices have for the most part been identical at a given time even when the quotations were made in sealed bids. Some of these, as shown, were identical to the fifth decimal place, and could not be arrived at except through careful calculations from identical factors (Tr. 4093; 6195; 9127). It was shown that the variation of a fraction of a cent per barrel below the price of a competitor would secure an order and "upset the price structure" (Com. Ex. 184-Q; 190; 282-B; Tr. 4074; 4093).

Cement is priced and quoted by the barrel, 380 pounds, and the freight quotations are made per hundredweight. In expressing freight, therefore, in terms of bbls., there are fractions to be encountered which tend substantially to deviation. In railroad calculations one-half cent or less is dropped from a final aggregate, but in conversions from hundredweights to barrels, fractions may be dropped for every 380 pounds, which deviations might vary the destination price as much as $1.25 per car, as between a freight bill figured on hundredweights and one figured on barrels

for a per barrel quotation. These small variations would be fatal in government lettings where a difference of a cent might secure the award (Tr. 34720; 46714; Com. Ex. 184-Q; 969-D; 971-31V, W; 1139-R, S).

Arriving at identical land grant rates presents additional difficulties. In fact, it was shown that land grant rates could seldom be figured closer than approximate figures and that estimates were used in price-making, while final and controlling government figures were nearly always different (Tr. 1500; 1547; 1568; 1730-7; 1820; 8946-56; 9203; Com. Ex. 159-36, 37; 174-83; 184-I; 562-7S). Changes in freight rates often introduced disturbing factors and caused price quotations to be different as between producers receiving the freight change and those who did not (Tr. 31921-24; 33155; Com. Ex. 2461).

115. Growing out of or succeeding to the activities of the National Freight Rate Bureau Service (Tr. 17126; 38558), the Nazareth Freight Rate Bureau (Tr. 4029; 38558), the Freight Rate Service of the Cement Manufacturers Protective Association (Tr. 26997; 35803), and other agencies (Tr. 38708; 4465-71; 35126; 14320; 7004; Com. Ex. 749-VV), the Cement Institute, after taking the vote of its membership, established in 1930 the Cement Institute Freight Rate Bureau. The first office was in Bethlehem, Pa., in charge of Mr. George Reigart, who formerly operated the Nazareth Traffic Bureau (Com. Ex. 988-G, H; 635-A). This Bureau was organized to and did issue freight rate books for distribution to members of the Institute. The books contained freight rates on cement from basing points to numerous, if not all, railroad stations in the States covered. These were later compiled and issued from Chicago and other offices of the Institute, and covered all States of the United States except Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming (Inst. Answer; some of the books in evidence are Com. Ex. 994; 1000; 1110-A to 2D).

116. The Institute rate books do not contain all the freight information which would be required by traffic men in order to make the usual accurate entries on bills of lading and to check freight bills. They fail to give routing information, do not contain rates for other than minimum weight cars, nor are switching charges and differences in rates to different parts of a city included in the rate book. Initial carrier information is often necessary in order to secure lowest freight rates between points, but this infor-

mation is lacking in the books. No railroads are referred to in the books (Tr. 9365; 9549). In fact, the Institute rate books contain no shipping information whatever except a single rate for freight shipments of cement from various basing points to given railway stations (Tr. 4074, et seq.). The books contain the necessary information to enable their users to have identical freight factors, but further information than that contained in the books is required even for invoices which must ordinarily show both the initial carrier and the route (Resp. Ex. 2291-3-30; 41, 52, 65; Com. Ex. 2707-71, 72, et seq.; 2796-1, et seq.).

117. Price variations resulting from different rates to different stations in the same city, or discrepancies between prices which might result from changes in rates not being simultaneously reported or noted, can be avoided by uniform use of the rates in the book for all pricing calculations (Tr. 6195; 6221; 5027; 31946—a failure). Salesmen carried these books and used them to quote delivered prices (Tr. 5025-7; 6777) and their use was recognized by Mr. G. E. Pierson, vice president of Lone Star of Indiana, as well worth the $595.00 which that company estimated to be the proportion of its dues to the Institute covered by the freight rate service. Mr. Charles L. Hogan, vice president, had urged Mr. Pierson in a letter of September 3, 1931 (Com. Ex. 2461), that the service was "well worth the money * * * in that it has a distinct advantage over any individual company record, because it disseminates freight rate information to practically all of the companies in a given territory, and thereby serves to prevent variations in quotations by the various companies, which might be due entirely to incorrect freight information" (Com. Ex. 2462). It was regarded as important that the conversion tables in these books should conform (Com. Ex. 2463); see also (Tr. 31921-24; 33155). The Institute rate books were not intended to be used for shipping purposes (Tr. 5249-51; Com. Ex. 1002-A, B). The books were used for pricing (Tr. 4022; 6778; 6194; 7514; 8236; 19207-35).

118. Use of the rates set out in the Institute rate books for calculating delivered prices in preference to the use of other rate information is explained in Com. Ex. 287-A to D. A salesman of Lone Star had figured a Virginia Highway bid based on freight information not contained in the Institute rate book, which bid was, consequently, the lowest one and secured the business. Mr. Neylan, general sales manager of Lone Star, did not like this, and went

into the matter with Mr. Fontaine, as shown by the correspondence of October 15, 1936 (Com. Ex. 287-A), October 23, 1936 (Com. Ex. 287-D), and November 11, 1936 (Com. Ex. 287-B, C), in which last named letter Mr. Neylan directs his subordinate to give certain instructions "in order to avoid in future what occurred in connection with this particular transaction." Referring to the use of rate figures, Mr. Neylan wrote:

"The Rate Bureau cannot be expected to maintain the close scrutiny over cement rates that is possible by members of the industry. On the other hand the freight rate books are furnished to members of the industry as the official rate basis and, as such, they are accepted by the industry as containing the rates on which prices are based. The reason for this is perfectly obvious. To do otherwise, would quickly result in a chaotic condition due to local changes in rates which would be known to those companies most deeply concerned and would probably be overlooked by the companies whose interest was not quite as great. So far as our company is concerned, we have always worked on the policy that the freight rates shown in the rate books are the only rates we will use in the computation of prices. If we have knowledge of any rates that are different from those in the rate book, then we have an obligation to inform the Rate Bureau of the new rate before such a rate is used in computing a price."

119. The Institute continued the issuance of the freight rate books for use in the States as heretofore indicated from about June 1930, to July 2, 1937, and thereafter. Many respondents testified that the Institute rate books saved them money in that their use reduced their traffic department expenses, and that they used the books for shipping purposes. It appears, however, that an Institute rate book for a given State contains more rates than would be required by the shippers in the particular State. The Alabama book (Com. Ex. 1110-A), for instance, contains rates to Alabama points from basing mills in Tennessee, Ohio, Florida, Louisiana, Georgia, Missouri, and Kentucky outside of the State. This information could not be required for traffic purposes, but was very necessary for the purpose of determining the delivered prices which outside mills would charge, provided they used the formula of base price plus the freight rate given in the Institute book (Com. Ex. 994; 1000; 1110-A to D, rate books; and Tr. 9365-70; 9403-43; 9592 to 9620; 19206-35).

VII. (b). Trucking.

120. The cement industry generally found the business of selling cement at an f.o.b. mill price (i.e., regular delivered price less rail freight) when loaded in customers' trucks at the mill to be a source of annoyance and price disruption (Com. Ex. 970-4L; 970-6G; 422-G; Tr. 9127; 6701, et seq.). Delivered prices as shown were based on rail freight rates and where customers effected savings by reason of the cheaper truck transportation, they could undersell other dealers at various points who had paid prices which includes the full rail rates (Com. Ex. 969-D; Tr. 7697; 912). Mills found that customers would be diverted by reason of shorter or less expensive hauls in their own trucks, and the producers would have to vary their mill nets in making allowance for the differences in truck costs (Com. Ex. 1203-SS to VV; 969-5J, K, 10-0). Lehigh's report on this to Professors Burns and Clark says:

"The manufacturer, striving to figure his prices on indeterminate and fluctuating trucking rates and to meet the equally fluctuating and indeterminate rates from his competitors' plant, quickly found himself engaged in blind, reckless and destructive competition." (Com. Ex. 969-14M.) This report says further, regarding the disadvantages of so selling to trucks:

"(2) The retail building material dealer found his market invaded by dealers from far distant points. The distant dealer, buying from some manufacturer who sold at a reduced mill price to meet the competition of a mill more favorably situated to his market, might deliver the cement to some intermediate market where he would normally do no business, to the demoralization of that market. The majority of cement dealer accounts are arranged on the basis of the manufacturer giving a dealer in a market the exclusive sale of that manufacturer's brand. Naturally, when an outside dealer made a sale of the sort described, the local dealer handling that brand felt that the manufacturer had broken faith. Cases of this kind were numbered by the hundred and created a general demand from the building material dealers that the cement industry discontinue truck sales. This sentiment grew steadily in strength and made an increasing impression on the cement manufacturers, who must depend on the retailer as his market for a large proportion of their output. The dealer also contended, we-

think soundly, that accepted marketing practices of thirty years standing had established the carload as the wholesale unit, and that when the manufacturer sold in a small unit for truck delivery he was in reality invading the retail field.

"(3) Contractors found that they could not depend on any degree of stability in cement prices. A contractor bidding a job faced the danger that his competitor might have a cement cost so much lower that this item alone might determine the award. There were numerous protests from contractors that trucking practices caused discriminations and inflicted injury."

121. Prior to 1932 various respondents attempted to meet this situation by adding a 15¢ per barrel charge to the mill base (or net) price for all cement loaded on customers' trucks at the mill (Tr. 23671). But this practice did not become general and was considered by Lehigh not to be successful.

"By 1932," says the Lehigh report, "it was clear that trucking practices were one of the chief contributory causes of the state of chaos and demoralization in which the industry found itself. When about August 1932, one manufacturer announced he would no longer load trucks but would sell only in carload lots, his action was met by practically all manufacturers in the Lehigh area" (Com. Ex. 969-14-O; see also 970-6G). This practice was taken up by the various mills throughout the country, except as hereafter stated, and from 1933 to the present time there has been practically no selling on a true f.o.b. mill price to trucks (Com. Ex. 970-D; 970-2G, 4L, 2V, 12F; 545-6Q; Tr. 7620; 7714; 7662), but many respondents made mill deliveries to trucks at the delivered price based on the rail rate to the purchaser's location and without deduction of the transportation charges from the price (Com. Ex. 970-4A, 4L, 4W, 5H, 5S, 6V, 7V, 8-I, 9-O, 10-P, 14-I; 277-L; 969-11R; 976-15-I).

122. This situation on the west coast, where there are fewer railroads to consider, is not the same in all respects but trucking is prohibited or discouraged by most of the western respondents (Com. Ex. 967-9V; 976-9X, 14R; 967-D, T. 2J; Tr. 8645; Com. Ex. 967-7J; 967-13L, 7Z), except Pacific (Com. Ex. 968-11K, 12E), Oregon (Com. Ex. 967-2Z) and Three Forks (Com. Ex. 967-14H), while Cowell sells f.o.b. mill for local use (Tr. 8775). The California

State Commission regulates trucking rates, and ordinarily no saving can be made by a dealer through the use of his own trucks (Tr. 8942; 9087; Com. Ex. 971-10Z; see also Com. Ex. 2661-A, 1947; 286-G).

In addition to the foregoing disadvantages connected with trucking, many manufacturers who had previously permitted it discovered that the loading of trucks was an inconvenience, an extra expense, and even dangerous (Tr. 3432-9; 6121; 6788-9; 6802; 7277; 8447-51; 8760; 23671; 35675; 38149-52; 42375). Many dealers opposed trucking and were active in their opposition (Com. Ex. 2397-C to 2399-A). Even the return of empty sacks by truck was opposed as leading to difficulties (Com. Ex. 2423-A).

VII. (a) Diversions.

123. Diversions of shipments in transit, when they resulted in the delivery of cement at a given point at a total cost of less than the local delivered price, enabled the purchaser to undersell other dealers and had the effect of disrupting the price structure (Tr. 6587; 6698-700; 7341; 23301; 23324-36). Respondents are practically unanimous in their opposition to diversions and in their practice of discouraging it, but some testified that the reason for their attitude is that diversions, if allowed, would effect price discriminations among both sellers and buyers. The practice, as shown, would enable one buyer to own cement at some points at a lower price, or total cost, than paid by competitors at these points, and would therefore result in price cutting or the quotation of different prices as between different dealers (Tr. 7966). Both manufacturers and organized dealers opposed diversions; the latter made protests against it both directly and through dealer organizations (Tr. 7665-6; 7973; 37632; 38233; 40592; Com. Ex. 556; 561; 584-G; 828-7E). Diversions, however, do not cause respondents to receive less revenue from a given order (Tr. 13627-33; 36641-2; 38242).

124. It was previously the practice of railroads to regard the consignee as the owner of goods in transit and to carry out consignees' instructions as to diverting cars. Many respondents claimed the right to prevent diversions unless made with the consent of the shipper. Early in 1937 the High Point, Thomasville & Denton Railroad diverted a car consigned to Cru'shfield Hardware Company,

Thomasville, N. C., to High Point, N. C., the latter being nearer freightwise than the point of origin, York, Pa. Complaint was made to the shipper, respondent Medusa, which allowed the High Point dealer, Beeson Hardware Company, $80 damage and collected this (finally) from the railroad which paid it as a policy measure (Com. Ex. 546-K to Q, 2J). About July 20, 1937, Mr. John J. Claus, of Lehigh, filed claim for $20.59 with the Pennsylvania RR. for failure to observe anti-diversion clause and diverting shipment to Farmingdale, N. J., from Englishtown, N. J. (Com. Ex. 750-G; see also Tr. 23337; 38247-50).

125. Prior to 1935 the railroads had refused to accept bills of lading containing restrictions against diversions, but on March 14, 1935, the Traffic Executive Committee of the Association of American Railroads approved the acceptance of bills of lading bearing the following stipulation:

"This is the property of the shipper and no reconsignment of diversion is to be made unless authorized by the consignor."

Mimeographed notice of this was sent under date of December 18, 1935, by Mr. D. S. Browder, traffic manager of Penn-Dixie, to the following companies: Alpha, Cumberland, Hermitage, International, Kosmos, Lehigh, Louisville, Marquette, National, Signal Mountain, Southern States, Universal, and Volunteer (Com. Ex. 584-G).

The notice states that the notation had been used since the middle of May and had worked satisfactorily. The companies were advised to inform the railroads serving their mills so as to "initiate a smooth working arrangement" (Tr. 38247-50; Com. Ex. 584-G; 749-VV; Resp. Ex. 2908).

126. On May 24, 1935, Mr. Browder had notified certain eastern railroads of the aforesaid action of the Traffic Executive Committee of the Association of American Railroads, to wit: Lehigh & New England RR. Co., Delaware, Lackawanna & Western RR. Co., and Lehigh Valley RR. Co. (Resp. Ex. 2908-A, B, C, D, E, F). Mr. Walter S. Wing, of Penn-Dixie, on May 23, 1939, in directing Mr. D. S. Browder to notify the eastern railroads of the intended use of the stipulation on their bills of lading says: "We are hopeful that this plan, if followed by all competitors, will, to a great extent, remove the danger of diversion" (Resp. Ex. 2908-D). Mr. Browder testified that through the use of the stipulation by the mills in the east on bills

of lading from May to December 18, 1935, "we found that it did have the desired—that is, it prevented diversions." The practice was then extended to Penn-Dixie's southern mills and their competitors' mills (Tr. 38247; 39782; 4006-7).

127. In 1930 diversions were declared in the Institute Code of Ethics, Par. 14, to be an unfair trade practice "in cases where the result of such diversion is to enable purchasers or users of cement to secure cement at less than the manufacturer's market price at the point of final delivery" (Com. Ex. 138-S). Thereafter diversions in transit were prohibited by the N. R. A. Code which succeeded the Code of Ethics (Com. Ex. 556-P16).

128. The "Compendium of Established Terms and Marketing Methods," employed by respondents through the Institute after the Code, and adopted on or prior to December 9, 1935, recommended a specific sales contract form containing provisions against diversions and penalizing the practice (Com. Ex. 561, p. 21).

129. Prior to May 14, 1935, at a meeting of the Committee on Transportation of the Portland Cement Association, which Frank E. Guy, traffic manager of Universal, and E. S. Gubornator, general traffic manager of Lehigh, attended, the matter of notations for bills of lading to prevent diversions was discussed and reference made to the aforesaid action of the railroad organization (Com. Ex. 749-VV; Tr. 38249; 38577).

The shippers could discover diversions from the receipted freight bills which respondents insist on receiving from consignees, but dealers fail to return these. Prepayment of freight is an effective preventive of diversion, and this is being employed at the present time (Tr. 4068-70; 38240-2; 29863; 39538-40).

VII. (d) F.O.B. Mill Prices.

130. The cost of cement at the point of use is the controlling factor with purchasers and determines their selection of vendors where a variation of quotations are met with, and for many years manufacturers of cement have quoted delivered prices to dealers and contractors. F.O.B. mill prices have the disadvantage of revealing price inequalities where variations are made by absorbing differences in freight to different points and to meet quotations

of competitors encountered at various points. In the Code proposed by the Institute for the N. R. A. (Com. Ex. 556, p. 6), it was recommended that, in order to protect trade in favor of "* * * * the fair, constructive, and cooperative majority of the industry" from "the recalcitrant wasteful minority therein who engage in unfair competition" (or price cutting), "all cement quotations and sales shall be f.o.b. point of delivery, and all cement shall be sold on such delivered basis; provided, however, that in making quotations and sales to the Federal Government, cement shall be sold f.o.b. plant, in the event land-grant rates may be availed of by the Federal Government in arriving at delivered cost" (Com. Ex. 556, p. 6, 7). This provision was not in the Code as adopted (Com. Ex. 557).

131. Bidding f.o.b. mill to the Government was found to render it impossible for competitors to "bid on a parity" (Com. Ex. 277-K; Tr. 213) when land grant rates were involved. These were rate reductions enjoyed by the Government in return for land grants or bond aid extended to certain railroads and which reductions ordinarily amounted to about 50% of commercial rates. These rates are difficult of exact determination and it is practically impossible for different members of the industry to arrive independently at a definite rate which they could be sure the Government would apply in awarding the contract (Tr. 8946; Com. Ex. 184-Q). In a few cases, at the request of the Code Authority, the War Department included in their proposals the exact land grant rate that would be used in making the award; but in most cases the Government refused to give out land grant information (Tr. 1500; 1782-85; Com. Ex. 562-7S), and in such cases an f.o.b. mill bid for deliveries where land grant rates apply always run the risk of being a cent or more lower or higher per barrel than other bids (Com. Ex. 190-A to K; Tr. 1559; 1563, 8946-56; 9203; 174-233; 1730-7; Com. Ex. 277-K; 1292; 159-36, 37). This was avoided by bidding a destination-cost-to-the-Government bid, arrived at by taking the prevailing destination price (based on commercial freight rate), subtracting commercial freight, and adding the estimated land grant rate. This destination cost was a definite figure which competitors could meet with certainty when ascertained from the Code Authority or when otherwise discovered (Tr. 174; 217; 1565-6; 8946; Com. Ex. 277-K, L, M).

132. In order to permit of shipment on Government bills

of lading, thus securing the land grant rate to the United States, some respondents filed with the Code Authority prices to the Government with the following "control clause":

"The U. S. Government shall determine its cost f.o.b. cars ..... for invoicing purposes on shipments moving on U. S. Government bills of lading to the above named destination only, by subtracting from the above mentioned destination cost to the U. S. Government the land grant rate as determined by the U. S. Government as being applicable from ..... to said destination, the actual commercial freight rate or special U. S. Government rate applicable from ..... to destination named, whichever rate is the lowest."
(Com. Ex. 840-I and J; Tr. 3693-3706).

This preserved the destination cost bidding and enabled the Government to make a saving approximating the land grant advantage, but it was different in some particulars from an f.o.b. mill price. The destination cost bid was a fixed price to the Government and could not be reduced or raised in case the estimated rate were found to be different from the actual rate. (Tr. 1785; 1795; 3704; 1824; 1547-57). But instances were shown where the estimated land grant rate used to make up the "destination cost" price by adding to mill net after deducting commercial freight from the prevailing "destination price," was higher than the actual land grant rate. This deprived the Government of a part of its land grant rate advantages, as the actual rate would have been added on a true f.o.b. mill bid (Tr. 1279; 1795; 2331; 3381; 3704), and netted the mill more per barrel than it receives on commercial business (Tr. 2349). On the other hand a low estimate of the land grant rate would insure a small gain for the Government as against the use of the correct rate (Tr. 2337; 3370-74; 3748).

133. There was no showing that the destination cost bids with control clause were adopted for the purpose of depriving the Government of freight advantages but, as stated by Mr. Geo. H. Reiter to Professor Burns (Com. Ex. 277-K, M), the method was devised and employed in order to enable interested members of the industry "to bid on a parity" (Tr. 2198; 3361; 3370-3373; 3376).

134. This method of bidding "destination cost" avoided the variable factor or land grant rate, so far as pricing was concerned, for it stated a definite sum which competitors

could match. Deduction under the terms of the control clause produced a figure for invoicing purposes, but such figure was not necessarily what the shipper was to receive (supra). During the Code period the "destination cost" price was filed with the Code Authority five days prior to the letting, or effective date, and was, immediately on being filed, available to other bidders who were privileged to meet it (Tr. 3748; Com. Ex. 840-H, I; 841-JJ; 3692; Tr. 3051-75). After the Code the prices were filed with the Institute's Trade Practice Committee under the same conditions (Tr. 3692-3; Com. Ex. 547-3W to 3Z; 561). In December 1935, filing was discontinued and the Institute began collecting and publishing land grant rates (Tr. 3712; 3693; 3718-35; Com. Ex. 841-A to JJ). This had the effect of putting land grant rates on the same basis as other rates and of enabling all manufacturers to know what freight factors their competitors were using (Tr. 3748-50; Com. Ex. 841-JJ; Tr. 8956).

135. Prior to the Code, Government purchasers were able to get f.o.b. mill prices as well as delivered prices when invitations required either or both quotations (Tr. 219; 241-2; 33224-34; 36879). Since the adoption of the N.R.A. Code in November 1933, it was the experience of the Denver Purchasing Engineer of the Bureau of Reclamations that most of the bids quoted destination cost prices (Tr. 243-245). Other purchasing agents had similar experiences in failing to get regular f.o.b. mill bids under or since the Code (Tr. 132; 186; 1258; 1531; 1877; 1842; 2202-9; 2298; 2311; 2532; 3547; Com. Ex. 367). It became the general practice for all respondents whose trade was affected by land grant rates to use the method which involves destination cost bids and use of the control clause on government business (Tr. 3053, and supra).

136. In 1934, the Code Authority was informed through Mr. Barton W. Murray, Deputy Administrator, N.R.A., that the President of the United States desired cement manufacturers to be encouraged to submit f.o.b. mill prices and urged that the question be placed before the Code Authority and that a report of their action be made especially as to rates to State and Federal agencies. The minutes of the Code Authority meeting in San Francisco, Calif., on May 14-15, 1934, show that, pursuant to a unanimous vote, the Authority replied by requesting "an audience to present to the President of the United States the facts as we see

them which we think justify the present method of selling and quoting our product" (Com. Ex. 559-A, B; Tr. 3056-8). The industry never conformed (Com. Ex. 7-B; 1890-98; see also Tr. 132-232; 2204-10).

137. After adopting a dealer policy (infra) many respondents failed and neglected or refused to bid direct on P.W.A. jobs and in some cases refused to permit orders sold by dealers to be shipped on Government bills of lading. This policy and transactions thereunder operated to deprive the United States Government of freight savings on all of its purchases for Federal emergency or unemployment relief agencies. The aggregate of these savings would have made a large sum (Tr. 2189-95; 2223-53; 2269; 2495-9; 4946-66; 24976-85; Com. Ex. 1061-A to C). That dealer organizations cooperated in the establishment and maintenance of the foregoing policy appears from Monarch's statement on Com. Ex. 2389 and McQueen's statement in Com. Ex. 2401, par. 2; the latter, referring to the activities of the National Federation of Builder Supply Associations, says:

"There were those who said 'it couldn't be done.' To them it seemed a hopeless task to buck a Department of the Government which was determined to buy direct. However, it has been done and, in my judgment, it is conservative to say that in excess of $50,000,000. of business will be held in dealer channels which, but for your help and that of the others who joined with us, would certainly have gone direct. Not only would we have lost this splendid volume, but buying precedents would also have been established which would have continued to cause severe losses for years to come."

The dealer plan was followed at the expense of lost business (Com. Ex. 1951-A). Dealer influence on respondent policies was explained by the statement that there are 30,000 retail dealers in the United States and that they had more influence than 90 cement manufacturers. Consequently Art. II of the Code was superseded (Tr. 4263-6; see Com. Ex. 2401, 3rd par.).

138. The general policy in the industry is to refuse to make f.o.b. mill sales even where land grant rates and the Government are not involved. It is regarded as a practice which "won't work" (Tr. 12337) and which disrupts the price structure (Tr. 13388-400; 33218-20). Refusal to give f.o.b. mill prices was claimed by one respondent to insure

higher mill nets (Tr. 47295). Another refrained from such quoting because it thought it would take advantage of its competitors who would retaliate (Tr. 7284; Com. Ex. 1189; contra, 23; 128). Many cases of derived f.o.b. mill bids were shown. These are derived by subtracting freight from the delivered price at a known destination. Such an f.o.b. price might vary with each destination and is not a true f.o.b. mill price which represents the price at which the mill was selling generally (Tr. 3703-6; 9211; 18283-4). But it was shown generally that sales to railroads on which sellers were located were made on a true f.o.b. mill basis without point of use being stated. Other railroads were sold f.o.b. nearest junction (Tr. 3896-7; 3991; 38147; 41815-17; 42288-9).

VII (o) (f) Dealer Definition and Policy.

139. Individual respondents have had their qualifications for dealers for many years (Tr. 24711) but some time during the period from 1915 to 1919 the Trade Relations Committee of the Portland Cement Association circulated what was considered the best of many definitions of a dealer sent in by Association members requested to report on policies and practices (Tr. 24711). But uniformity of thought and practice respecting dealers was further established by the discussion leading up to the adoption of the N.R.A. Code. The Code definition is as follows:

"A cement dealer as used herein is one who has an established place of business where he is regularly engaged in selling Portland Cement and other building materials to the public, with facilities to serve the retail trade in a given territory and able and willing to perform all functions devolving upon him in securing, performing, and protecting contracts for the delivery of Portland Cement for specific work on his account."

(Com. Ex. 557, p. 340). This definition, although not included in the "Compendium of Established Terms and Marketing Methods," used after the Code, was included verbatim in statements of policy issued by numerous respondents about April 1935, and thereafter (Com. Ex. 1192; 1935; 1936; 2389).

These statements of policy also involved the classification of business into that which the manufacturers would sell direct and that which would go through dealers.

Under date of February 20, 1935, Lehigh sent out the following announcement of policy:

"For some time efforts have been directed by both dealers and manufacturers toward establishing a policy for the sale of cement which would adequately protect all interests concerned.

"Efforts to secure approval of the marketing provisions of the Code of Fair Competition for the Portland Cement Industry have thus far produced no definite results. The prospect for an early settlement of this very important matter is not encouraging.

"Numerous requests have been received from dealers for a declaration of sales policy and in answer to these requests we set forth below the policy which will hereafter be followed in the distribution of our products.

"Lehigh cements will be sold to and through dealers, except for the following buyers, whom we will sell direct:

1. The United States Government and State Governments. (Provided that cement for work of Federal relief agencies located entirely within cities, towns or villages will be sold through dealers.)

2. Counties and Parishes. (Provided that contractors on county or parish bridge and culvert work awarded separately from highway contracts will be sold through dealers).

3. Railroads filing tariffs with State or Interstate Commissions.

4. Water power and water supply developments, flood control and irrigation projects except when such work is located entirely within cities, towns or villages.

5. Contractors doing any of the foregoing classes of work, except where such work is located entirely within cities, towns or villages.

6. Manufacturers of concrete and cement products, for their own manufacturing operations but not for resale.

7. Commercial concrete mixing plants, at their regularly established places of business, for their own processing operations, but not for resale."

(Com. Ex. 873-C, D). This was followed February 22, 1935, by Lone Star with an identical announcement (Com. Ex. 873-E, F). Other companies followed with similar statements (Com. Ex. 873-G, M; 1932).

140. On February 25, 1935, Mr. L. I. McQueen, secretary of the National Federation of Builders Supply Asso-

ciations, sent out a letter to all directors of the National Federation and to several hundred outstanding dealers throughout the United States to "obtain a referendum from leaders of the industry in order that your officers may determine what the industry desires." The letter says further: "You will find enclosed a typical statement of policy such as is being issued by individual cement companies throughout the United States. So far as they have been issued by the cement companies, we believe the statements of policy are identical" (Com. Ex. 2390). Replies were requested by March 4 giving their opinion of the policy suggested (Com. Ex. 2390; 2393). Com. Ex. 2394-A, B, is a reply discussing this policy. As early as April 13, 1935, a statement of policy was issued by Castalia as follows:

"On February 28th, 1935, we sent you a statement of our marketing policy. For the best interests of our dealers and our own industry we have revised this policy as stated below.

Statement of Sales Policy.

"We consider the definition of an equipped cement dealer to be as follows:

"A cement dealer is one who has an established place of business where he is regularly engaged in selling Portland Cement and other building materials to the public, with facilities to serve the retail trade in a given territory and able and willing to perform all functions developing upon him in securing, performing and protecting contracts for the delivery of Portland Cement for specific work on his account.

"It is our policy to confine all sales of our products to the equipped cement dealers, with the following exceptions:

1. To the United States Government (except cement purchased by Federal emergency or unemployment relief agencies).

2. To State Governments (except cement purchased by State and Federal emergency or unemployment relief agencies; and except cement purchased for work other than highway pavements and grade crossing elimination).

3. To counties for highway pavement contracts only, not including cement for bridges, culverts and repair work awarded separately from highway pavement contracts.

4. To railroads filing tariffs with State or Interstate Commissions.

5. For water supply developments except when such work is located within or adjacent to cities, towns or villages; for large water power, flood control and irrigation projects, except when such work is located entirely within cities, towns or villages.

6. To contractors for any of the foregoing work only, except as noted above, and unless such work is located entirely within cities, towns or villages.

7. To large manufacturers of concrete and cement products who consume the cement exclusively in their manufacturing operations. No cement sold to such buyers shall be resold or used for any purpose other than the manufacture of concrete and cement products.

8. To commercial concrete mixing plants, at their regularly established places of business, for their own processing operations, but not for resale."

(Com. Ex. 1935.) This policy under various approximate dates was issued by Diamond April 11 (Com. Ex. 1925); Superior, April 15 (Com. Ex. 1936); Lone Star, April 9 (Com. Ex. 1165-G, H; compare Feb. 21, Com. Ex. 1165-I, J); Lawrence, April 9 (Com. Ex. 270-J); Edison, April 9 (Resp. Ex. 2585); Monarch, April 30 (Com. Ex. 2389), and many others (Com. Ex. 2402, 1st par.; Com. Ex. 2398-A, 2nd par.). Similar policies prevail generally in the trade (Tr. 2408; 6304; 8741-2; 8638).

141. An elaboration and interpretation of the policy of April 13, 1935 (Com. Ex. 1935) was worked out by J. D. Scovel, an official of Universal. This is entitled "Method of Marketing Cement," and is shown as Com. Ex. 2359-A to F. Numerous other copies issued by or found in the files of various respondents were received under other exhibit numbers, some being cited hereafter. This was drawn up after a number of group discussions between competitors had been held in Chicago about April 9, 1935. Mr. Rohwer, of Universal, and Mr. Calvin were present: Alpha, Consolidated, and others were represented (Tr. 13174-83). This marketing plan takes up each numbered paragraph of the April 1935 plan and gives definite instructions for sales thereunder (For other copies, see Com. Ex. 2197; 2220; 1904).

Copies of the marketing method were sent by Universal to other companies (Tr. 13178-9). International (Lone Star), on July 19, 1935, sent copies of the method containing slight additions to all of its subsidiaries with the in-

formation that the plan had met with general approval, and with instructions that the plan be carried out in all territories (Com. Ex. 2426; 2427-A to E). In this (Texas) copy the provision for selling through dealers for work in cities and towns was rendered more definite (Com. Ex. 2427-A, B). On July 24, 1935, copies of a "Method of Marketing Cement" similar in all material respects to those mentioned, were sent from the office of the Sixth District of the Cement Institute to W. E. Harkness, Florida purchasing agent, and to Lehigh, Lone Star, Hermitage, and nine other respondents (named) (Com. Ex. 547-4B, 4C, 4D to 4I; Tr. 37360; 4929; 4935).

142. Committees from dealers' associations "sat in with the heads of the cement industry and worked out a cement distribution statement" and it was accepted as part thereof that the dealer should receive 15c per barrel profit (Com. Ex. 1904-A; 1905-A to F; 1906-A, B). Northwestern and other respondents received the method, and its adoption and use were understood to be general (Com. Ex. 2197; Tr. 12538-44; 2220; Tr. 12719-40; Com. Ex. 2266; Tr. 13050-71; see also Tr. 35363-431).

On June 19, 1935, Secretary McQueen, of the National Federation of Builders Supply Associations, refers to the policy adopted by the cement companies as follows:

"The splendid service to the industry rendered by the Federation in connection with the sales policy generally announced by cement companies is illustrative of the necessity of the Federation and of its value to all federated groups. Without a doubt, this recently announced cement policy will annually turn not less than $25,000,000.00 worth of business into dealer channels, even at the present low level of sales volume."

143. Concerning the foregoing policies and concessions to dealers Secretary McQueen wrote all secretaries of Federated Units on April 19, 1935, stating that "a most important element in this revised distribution policy is the definition of an equipped cement dealer." He then urges and gives instructions for the preparation of lists of equipped cement dealers as defined by the manufacturers, to be made out by local committees and submitted in person to each cement manufacturer serving the particular market. Revised master lists were required to be furnished through the heads of Federated Units to all cement manufacturers (Com. Ex. 2392-A to C).

Com. Ex. 2305 is a list of "equipped cement dealers," sent by "Building Material Merchants of Chicago District," dated April 25, 1935. Com. Ex. 2396 is a list of Chicago dealers dated April 29, 1935 (See also Com. Ex. 867-7S, 7T, 5th par., as to definition of a "recognized" dealer; and Tr. 12980, as to lists of dealers).

144. Regarding observance and enforcement of marketing methods and dealer definitions before and after the final settlement of policy, various activities were evidenced. Dealers in Bridgeport, Conn., appear to have caused Atlas to discontinue selling a block manufacturer and Lone Star notified International of this situation. This was as early as November 1929 (Com. Ex. 1131-B). In 1929, Mr. Lawrence F. Power, secretary of the New England Builders Supply Association, wrote Mr. Ackerman, Lawrence Portland Cement Company, that he had received complaints from the Maine territory of sales made by Lawrence to other than recognized dealers (Com. Ex. 1158-A). Mr. Ackerman replied and made an engagement to discuss the matter (Com. Ex. 1158-B). Hermitage and Kentucky Lumber & Supply Association came to an understanding in 1937 concerning the non-diversion stamp and not permitting one dealer to sell in another's territory (Com. Ex. 547-M, P). This Association, referring at this time to the classification of T. L. Herbert as a recognized distributor or dealer says: "* * * however, we have had information come to us in the past as to his handling of roofing and insulation by methods that appear to be very unfair * * *." (Com. Ex. 547-U). Writing to the same Association December 10, 1936, reference is made by Hermitage to H. K. Williams as stocking cement and the statement is made that if he is not stocking, Hermitage will not sell him and run the risk of retaliation (Com. Ex. 547-Y). The Association had advised Hermitage that they believed it would be to Hermitage's best interest not to sell Williams (Com. Ex. 547-Z). This Association, December 9, 1936, takes up the case of X. B. Wickersham Co. with Hermitage as to its not being sold if it is not carrying a stock of cement (Com. Ex. 547-2B). Ragland Potter was declared by the Kentucky Association on October 30 not to be an eligible dealer, and Hermitage was so advised by wire (Com. Ex. 547-2D). An Irvington bidder for delivery at Elizabethtown was reported by the Kentucky Association and shipment was refused by Hermitage (Com. Ex. 547-2-I).

145. In 1933 the Ohio Builders Supply Association checked with West Penn as to quotations and dealer differentials on a post office job (Com. Ex. 549-S, V). At that time West Penn kept a Directory of the Retail Supply Dealers of New York State (Com. Ex. 549-T, see also Com. Ex. 549-U; 2E). This respondent also checked on prospective dealers and policy with the East Penn Builders Supply Association in 1935 (Com. Ex. 549-5C, 2F), and wrote for lists of recognized dealers "in order to make sure that our representative calls on the proper parties" (Com. Ex. 549-2L). West Penn also wrote for lists of recognized dealers to Harris Mitchell, Richmond, Va., in 1934 (Com. Ex. 549-3A), to Ohio Builders Supply Co., 1934 (Com. Ex. 549-3C; see also Com. Ex. 549-3G, 3P, 4I, 4K, 4L, 4M, 4N, 4T, 4U, 4Y, 4Z, 5C, 5X, 6B).

146. Iowa Association of Lumber & Building Material Dealers in 1934 complains to Alpha that it is selling H. A. Maine Co. and that Marquette is selling a contractor direct. H. A. Maine was a customer of long standing but Alpha suggests the possibility of cutting him out (Com. Ex. 731-6E, 6F).

Indiana Lumber & Builders Supply Association secured from Alpha, in May 1935, a statement that its policy is to sell small cement block plants "through legitimate dealers" (Com. Ex. 867-7V, 7W).

Dealers were classified, listed, and checked with manufacturers of the Southwestern Lumbermen's Association in 1935 (Com. Ex. 867-6Y, 7B, 7C). Illinois Lumber & Material Dealers Association sent out mimeographed instructions to retail dealers regarding bidding on Federal Government purchases (Com. Ex. 867-7E, 7H, 7-I).

VII.-(g) Confining Sales to the Dealer's Locality.

147. At all times during which cement was sold to dealers on delivered prices, it was the general policy in the industry to discourage and prevent dealers from selling outside of their localities and in territory served by other cement dealers (Com. Ex. 735-A, B; 557, p. 339; 1131-C, D; Tr. 7697-9; 7356; 14133). Such selling was opposed by manufacturers because (a) it offended and interfered with the dealer whose territory was invaded (Tr. 8742; 13731-3; 12249), and (b) it often upset the prevailing or going price in a locality (Tr. 4924; 6808;

7691-3; 13747). Dealers' organizations for the most part opposed such selling and often took up the fight and made protests to manufacturers who were accused of selling so as to permit dealer cross-selling and under-bidding (Com. Ex. 546-2K, 2L, 2-O, 2P; 1131-N, O; 547-A to 2-I; 731-4U, 4V, 1158-A, B, and citations supra). In some cases respondents exercised judgment in the matter of refusing shipments of this kind (Resp. Ex. 2586, supra); (see also 3940-41). Respondents' activities, shown elsewhere, to prevent diversions and trucking, were directed largely against the practice of dealers selling outside of their localities (supra).

VII. (h) Uniform Terms and Discounts.

148. In addition to the uniformity of pricing methods shown to exist in the cement industry, respondents maintain uniformity in all material respects in the matter of terms and discounts. At various times prior to 1931 and the Code period, variations of terms as between respondents appeared in the matters of trade discounts, sack allowances, and freight charges thereon, the terms of specific job contracts, and the like. These variations in terms, like those of price, manifested a natural tendency towards liberality and uniformity, that is, towards uniformity based on the most liberal terms or prices, and this was due to the necessity of sellers to meet any prices or inducements in this field offered by competitors (Tr. 2408; 12774; 35733; 41511; 41518; 41554; 3936; 37421; 6612-13; 6527-8).

149. The N. R. A. Code for the cement industry, approved November 27, 1933, brought about a greater uniformity of discounts and terms which did not in all respects follow the aforesaid natural tendency. It contains a "specific sales order" form and a "Form of Future Specific Sales Contract," which the industry adopted and which in all essential particulars it has followed since that time. These provisions remained in the revised or amended Code approved May 11, 1935, and were incorporated in the "Compendium of Established Terms and Marketing Methods," approved by the Trustees of the Cement Institute on December 9, 1935 (Com. Ex. 557, p. 346, et seq.; 560, p. 25, et seq.; and 561, p. 18, et seq.; 153-A to GG).

150. As perfected in the Codes and Compendium, and as followed in all substantial respects and as shown by respondents' quotation forms (Resp. Ex. 1428-A; 1430-A; 1427-A; 1386-A), invoices (Resp. Ex. 2084-A to M; 2085-A; Com. Ex. 1182-A to L), and specific job contracts (Resp. Ex. 2088-A; 2089-A), respondents maintained the following terms and discounts:

(1) 10c per barrel cash discount for total payment within 15 days, or net 30 days;

(2) 10c each allowed for returned cloth sacks; no allowance for paper;

(3) Uniform quotations for cloth sacks, paper sacks and bulk with uniform variable between them (45c over bulk for cloth sacks, 20c for paper sacks);

(4) Price guarantee on specific sales contracts, that is, the buyer is protected from a price increase;

(5) Buyer in case of diversion is to pay the seller's market price at the place of final actual delivery, and to pay the prevailing market price at the time of use if used for purposes other than specified in the contract;

(6) "Transportation charges * * * * will be paid by the Buyer for the account of the seller."

No respondent gives discounts or special prices on quantity orders. (For reason, see Com. Ex. 1174-K; see also Tr. 24986; 38731; 39864.

In other less important particulars respondents' terms and conditions of sale are similar, and in some there are non-essential variations at various times, as can be seen from the exhibits cited and numerous similar exhibits placed in evidence by both sides (Resp. Ex. 2907-A; Tr. 38579; 2603; 3936; 6028-32; 6406-7; 8638; 13168-9; 36782-3; Com. Ex. 553-Z, 2A; 828-7A; 1041-A to C; 3234; 3235).

VII. (i) Imported Cement and Zone Prices.

151. For some years the cement industry has had to meet the competition afforded by cement imported chiefly from Holland and Denmark, and sold in areas around New York, N. Y., Boston, Mass., New Orleans, La., and other seaports of the United States. Arbitrary or flat zone prices, lower than prices regularly computed on the basing point formula, prevailed at various times in these areas (Com. Ex. 2851-A); 958-4Z, 5A; Tr. 4487-93). Because of their failure to follow a definite formula with

known factors, these prices must be stated for all destinations or discovered at each in order to be matched (Tr. 7943-53; Com. Ex. 1182-A to L).

152. In December 1932, "in keeping with its past performances in other sections," Lone Star inaugurated the policy of classifying dealers in the Metropolitan District around New York City, including northern New Jersey. Dealers were divided into those who carried and sold foreign cement and those who did not. The former class was refused shipments of domestic cement by Lone Star (Com. Ex. 1132-A, B; Tr. 6551-6). Orders were refused and checks returned by Lone Star on the clearly stated grounds that it would not sell or enter into contracts with firms handling foreign cement (Com. Ex. 1132-C to H; Tr. 6560-6567). Lone Star salesmen checked and reported to it on stocks of foreign cement in Newark and Brooklyn. They noted the foreign brands, talked with warehousemen at dealers' warehouses, noted license numbers of dealers' and contractors' trucks, or observed the lettered signs on the same, and sent in lists of dealers to whom shipments should be refused (Tr. 6549-59). This policy remained actively in effect for about three years and has not been formally abandoned (Tr. 6560). Low prices and this dealer policy were carried out by Lone Star in New Orleans (Tr. 6539).

153. The following and other respondents and their salesmen were engaged in these checking, spying, and reporting activities: Atlas, Lehigh, Penn-Dixie (Tr. 7641-5); North American, Lawrence (Tr. 7517-18; 7719). Salesmen from these and other respondent companies rotated in these activities (Tr. 7811; 7872, 26959; 28160-3).

During 1933 all respondents operating in the New York area adopted this policy of refusing to sell dealers handling foreign cement. It was generally enforced about that time (Tr. 8812-14; 7719). Among respondent companies refusing to accept orders and who returned checks to dealers because of their handling foreign cement are: Alpha (Com. Ex. 1181-C, D; Tr. 7830; 7896); Lone Star (Com. Ex. 1179-A, B; Tr. 7718); Nazareth (Com. Ex. 1181-A, B; Tr. 7718; 7896); Penn-Dixie (Com. Ex. 1181-E, F; Tr. 7718; 7897-9); Coplay (Tr. 7839); Universal (Tr. 7718; 7720-1; 7811; Com. Ex. 1176); Lehigh (Tr. 7718; 7822); International (Lone Star) Tr. 7822; North Amer-

ican (Tr. 7826-7); Medusa (Tr. 7830-1); Keystone (Com. Ex. 1179-E; Tr. 7835); Nazareth (Tr. 7838); Glens Falls (Tr. 7839); Edison (Tr. 7899); Giant (Tr. 7838; see also Tr. 7899; 7900). Dealers were restored to favor and their orders for domestic cement accepted on their agreement not to carry foreign cement (Tr. 7720; 7759; Com. Ex. 1132-D, H). Dealers in foreign cement were "listed" and were not able to buy domestic cement for months at a time (Tr. 7719; 7752; 7753; 7767; 7782; 7820-1; 7847).

154. After this plan of refusing to sell dealers handling foreign cement became generally observed in the New York area, Boston dealers found that they were subject to the same restrictions (Tr. 7811-12). The Boston Bldg. Materials Association held meetings and complained against the boycott (Tr. 7813). Resolutions were passed and sent to the Cement Institute and to all cement manufacturers doing business in New England (Tr. 7815). After about six months from the imposition of these restrictions in Boston, Alpha began to solicit unconditional orders and within three or four weeks others did likewise (Tr. 7845). A short time thereafter the tension was diminished in the New York City area. These activities were apparent until about February 1935 (Tr. 7767-8).

155. Shortly thereafter, about July 1935, new arbitrary or zone prices appeared. North American filed a list of prices with the Cement Institute. Later Lehigh and Lone Star filed lists of special prices for many destinations in Maine, New Hampshire, Massachusetts, and Rhode Island. These filed lists were furnished other respondents by the Institute (Tr. 6572-6600; Com. Ex. 286-A to W).

156. For several months Lone Star, Edison, and the other respondents operating in the New York area, maintained stocks of cement in the Gowanus Canal section of Brooklyn, which they sold, at first only to dealers in Kings, Queens, Nassau, and Suffolk Counties to combat imported cement, at $1.82 in paper. On August 15, 1935, sales of foreign cement were found to extend over broader territory into New Jersey, the Bronx, Westchester County, and even Connecticut, and on that date Lone Star changed its policy and sold to all dealers at this price taking delivery at the Brooklyn Sixth St. storage. Early in September 1935, filings of reduced prices to meet the Boston situation were made with the Institute and distributed by it

to competitors. These affected points in Massachusetts, New Hampshire, and Rhode Island, at many of which two prices prevailed—one to meet foreign competition, and one for contracts (Com. Ex. 286-F; Tr. 7920-22).

157. Respondents endeavored to keep these low prices within small areas, but were unable to do so. Diversions and trucking from those low priced areas to territory where regular prices prevailed gave considerable trouble (Tr. 6579; 6586; Com. Ex. 286-G, 3rd Par.). Finally, on December 4, 1935, Lone Star, finding that one or more of its competitors had abandoned the Brooklyn selling from stock activities, announced its abandonment of deliveries from stock at the Brooklyn place (Com. Ex. 286-C, K; Resp. Ex. 1467 to 1472-A). This cessation is referred to by Mr. Neylan to his salesmen as "a breathing spell," saying "we may find it necessary to resume making deliveries in this fashion * * *" (Com. Ex. 286-D; Tr. 6581-5). For later zone prices prevailing in the New York area, see Com. Ex. 922-DD to ZZ.

Respondents took similar steps to meet the competition of foreign cement at Norfolk, Va., Mobile, Ala., New Orleans, La., Pensacola, Fla., or other seaports of the United States (Tr. 6532-9).

158. Zone, flat, or arbitrary* prices prevailed at times in sections other than seaports where complications rendered especially difficult the application of the price basing system, as in the case of Chicago and other cities having freight stations in different sections of the city and consequently different freight rates or switching charges. Respondents quoted and observed flat prices for these entire areas, regardless of the exact cost of transportation. This was explained as necessary to prevent one dealer customer from getting a price advantage over another, but it also facilitated price matching by manufacturers in these areas. In Chicago an arbitrary freight figure was added to the Buffington base, the actual freight from which to different locations in Chicago varied from 12c to 40c (Tr. 13521-5; see also 13537). Competitive conditions caused Superior Portland to maintain an arbi-

*Note: The term "arbitrary prices" as used in many parts of the record refers to prices not conforming to the basing point pattern and which consequently does not, on analysis, reveal a constant price factor.

trary price in Vancouver, Wash., against the Oregon and California mills (Tr. 8425-8).

Flat prices prevailed in areas in California around Los Angeles and elsewhere. Differences between trucking and railroad rates and service created price variables and competitive conditions which the arbitrary prices were designed to meet (Com. Ex. 971-23-A; Tr. 9034-56). Flat prices obtained in lower Michigan because of competitive complications (Tr. 11111-13). Such prices appeared at various times in Ohio, Utah, Arizona, and elsewhere, in 1936 and prior thereto (Com. Ex. 958-4W; 970-15Y, 16-A; Tr. 36810; 8916; Com. Ex. 1290; 1317; Tr. 42558-66; 33868; 33810). Where these arbitrary prices prevailed the regular price basing methods could not be employed and salesmen were furnished with lists of the prices (Tr. 7514).

VII. (j) Maintaining the Institute.

159. As heretofore shown, all of the respondents herein belonged to and maintained the Cement Institute during the times stated in paragraphs 7 to 80 hereof. As shown by the minutes and evidence of its various activities, the Institute was an agency common to all respondents, and while some of its activities affected respondents in a particular section, the effects of its activities with respect to price filing, dealer policies, the dissemination of statistical and other information, the formulation and promulgation of Codes and interpreting the same, the maintenance of a publicity committee or bureau, and its collaboration with the Cement Association, all went directly to the policies of the various respondent companies and tended to induce uniformity of price and method (Com. Ex. 138; 557; 561; 547; 590-A, B; Tr. 23855; 33448; Com. Ex. 1032-C to F; Tr. 4496-7).

160. Respondents produced many witnesses who testified directly that the Institute did not control or direct their policies, but there is much testimony and many exhibits, cited elsewhere herein, going to the aforesaid activities and others which necessarily involved the establishing or the affecting of policies. These are set out particularly throughout this report (See Com. Ex. 138; 547; 557; 561; 590-A, B, as well as numerous exhibits and

much testimony throughout the record; Tr. 26338; 27300; 24995; Com. Ex. 159-47).

On February 23, 1937, the Institute represented every member of the industry except Cowell, Republic, San Antonio, Ford Motor Co., Louisville, Washington-Idaho Lime & Prod. Co., National, and Standard Lime & Stone Co. (Com. Ex. 1033-C; see Com. Ex. 1033-D for list).

VII (k) Propaganda Re the Pricing System.

161. Considerable publicity was given the cement industry, its employment of the basing point system, its failure to quote the State of Illinois and the United States Government f.o.b. mill prices, and its identical bidding. At one time an anti-basing point bill was pending in Congress (Tr. 3091-2; Com. Ex. 836-3M to 3R; 836-2R, 2W).

To combat what was conceived to be an adverse public opinion, the Institute, early in 1934, inaugurated and maintained the Cement Information Bureau which operated from that date through 1935 and thereafter. It circulated during the time a great deal of selected material and had prepared and published a series of advertisements designed to educate the public along lines that would render members thereof more favorable to the industry's marketing methods (Com. Ex. 879-S to Y; 1032-C to Q; Tr. 4496-7; Com. Ex. 433 to 440; Tr. 35337-48).

162. Com. Ex. 434 to 437 inclusive are part of a series of these advertisements designed and published in order as numbered. They are entitled respectively, "Prolonging Our Lives," "Progress on Cement," "The Going Price," and "Keen Competition." The first two deal with the uses and manufacture of cement; the third deals with the delivered price feature and makes the argument that cement is standardized and "as staple as cane sugar or No. 1 wheat," and that "buyers refuse to pay more for one brand than for another." It says further: "The lowest price finally reached in the general bargaining process is known as the going price * * *. So it happens that in every town and city there is a going price for portland cement." (Com. Ex. 436.)

The fourth advertisement (Com. Ex. 437), after explaining the operation of the delivered price method, says: "Although a dozen mills may be quoting the going deliv-

ered price, each of them is necessarily netting a different amount. This," the advertisement continues, "is competition."

At the bottom of each advertisement appears in large type, "*The Cement Institute*," and "*Going Forward With Cement.*" (For extent of this advertising and publicity campaign, see Com. Ex. 1032-D to E. Tr. 4494-7).

Dual and Area Bases.

163. One variation of the basing point system to meet special trade conditions was that of a mill having two base prices, as in case of Alpha's Ironton mill. A higher base price was used below the North Carolina-Virginia line than was employed in computing prices in Ironton territory north of the line (Tr. 23128). Alpha also had dual prices in St. Louis (Tr. 23278). A Wyandotte base applied at one time for Michigan points but was not used for Ohio or other territory outside the State (Tr. 543; 572; 23279). New Jersey had an intrastate base (Tr. 23280; 24619). At El Paso, Tex., the base price for Arizona was different from that used for other territory (Tr. 39322) see also Com. Ex. 970-15N, 16N; 971-30E; 1122-A). As between the Lehigh Valley and the Hudson River Territory a constant differential of 10¢ between base prices obtained for some time (Tr. 24570, et seq.). Lehigh varied its Mason City base according to a regular pattern whereby its mill net would not go below 80¢ per bbl. (Com. Ex. 971-23P). There was a common base price in the Lehigh Valley as to all territory where freight rates worked out to a common figure as they did to all points more than fifteen miles from each mill. That is, all of these mills were in practice, or were considered, basing point mills (Tr. 6023; 10566).

Other common basing groups were: Hudson River Group (Hudson, Hudson Upper and Alsen only), Birmingham Group (Bayles, N. Birmingham and Phoenixville only), and Colton-Crestmore California Group, Portland-Concrete, Colorado Group (Com. Ex. 971-4V to 5C). As explained in the exhibit, the common base applies to points to which freights work out to a common figure.

Price Leadership.

164. Alpha reported to Burns and Clark that base price changes in the Fultonham-Osborn, Ohio, areas were generally made by chain mills and that Lehigh usually led in changes up or down (Com. Ex. 970-16B, 16H). Mr. Sunderland, president of Ash Grove, testified that it was usually the large companies which led in price changes, especially in reductions, and that the chains did not appear to consider local conditions (Tr. 13703-4). This statement appears from the record to be based on an experience sufficient to impress this witness with the unwisdom of assuming leadership on a downward price change (Par. 107, supra, and citations).

Among the larger chain organizations are Universal, nine mills (Par. 73, supra), Lehigh, twelve mills (Par. 40, supra), Alpha, seven mills (Par. 8, supra), Lone Star, ten mills (Par. 36, supra), Penn-Dixie, eight mills (Par. 57, supra).

In the Michigan territory, Huron was credited with leadership (Tr. 717; 862). In the matter of Aetna's involuntary base prices at Saginaw and Bay City, Mich., Huron and Wabash appear to have taken individual action, (Com. Ex. 18, 19; Tr. 14, 541-9; 553; 629; Com. Ex. 418-A, B). Lone Star took leadership in the Spocari incident (see Par. 105).

Lehigh took the initiative in imposing involuntary bases on Ash Grove at Rapid City and elsewhere, while Alpha and Lehigh are credited with some original quoting in placing bases at Speed, Ind., Kosmosdale, Ky., and Cape Girardeau (Pars. 105 to 110, supra). Alpha was considered by Diamond to have taken the leadership in the Plainsville and Osborn territory (Com. Ex. 970-D). Lehigh leadership extending far beyond the price maker's selling range is indicated in Mr. McCourtie's letter to Mr. Joseph S. Young, quoted elsewhere, in which the latter is accused of making quotations "three or four hundred miles further from its mills than it ever heretofore has made either quotations or shipments." (Com. Ex. 1195-A, B, 3235-Z59).

Price Rigidity.

165. During 1931 and the greater part of 1932 there was an unusual period of price fluctuations in cement. This period is referred to as one of chaotic conditions wherein basing point methods were neglected. Price cutting was general (Tr. 26909; 33417). Since those dates changes have been infrequent throughout the country and within narrow limits, often reflecting no more from year to year than a change in freight rates, leaving the realized mill net the same. (Resp. Ex. 1698; 2487; Tr. 8075; 8619; 28380-89; 29340-60). There were no fluctuations from day to day, and when changes were made all manufacturers announced the same prices within a short time, usually within forty-eight hours (Tr. 7760-5; 7903; 7943-5; Com. Ex. 1182-A to L). "Price cutting," or selling below one's announced price, was shown to have been indulged in occasionally during all periods, but such deviations for the most part were in favor of contractors rather than of dealers or the Government (Tr. 41791-4; see also Par. 93, supra; Tr. 28380-90; 35815-18; 31312).

Agreements, Understandings, and Communications.

166. Respecting all of the matters and things alleged in paragraphs V, VI, and VII of the complaint, it was testified to on behalf of each respondent that it did not enter into or become a party to any agreement, understanding, or combination to do any of the acts or to employ any of the methods or practices alleged in the complaint, and that all bids submitted by each respondent were determined and submitted independently of any other respondent and not by or through any understandings or agreements (Tr. 13719-29; 29407; 24271-89; 24294-5; 27162-3; 31049-50; 14338-40; Com. Ex. 2623; contra, Tr. 14356-62; 17442-53, and elsewhere abundantly throughout the record).

On the other hand, participation in the various biddings heretofore shown, membership in the Cement Institute, use generally of the basing point method of figuring delivered prices, uniform adherence to zone or arbitrary prices, conformity to dealer policies announced in March 1935, and thereafter, conformity to policies respecting trucking and diversions, the use of the Institute Freight

Rate Books, and the attendance of various respondents at Institute and other meetings, have not been denied by these witnesses except as to a few cases and circumstances as shown in the record.

The contention of respondents in this respect is that such of these meetings as they did attend were not unlawful and that the practices or actions taken thereafter were independent reactions to information and opinions received and exchanged with no obligation to accept or reject; but that, in many cases, the acceptance of one competitor was adopted by reason of competitive conditions which render it necessary for a vendor to meet the most favorable prices or terms offered by any competitor. Heretofore, with a few explanatory exceptions, this report sets out conditions and practices shown to have prevailed and from which inferences as to collusion, agreement, concerted action, or mutual understanding, may or may not be drawn, and in so doing the consideration of particular evidence on these subjects has been deferred as far as possible to this point.

167. In September 1902, the Association of American Portland Cement Manufacturers was organized and became active in the formulation and consideration of better selling plans for the industry and the minutes of the quarterly meeting held in September 1903, refer to the making of forms for standard contracts in collaboration with a Committee from the Interstate Builders Supply Association. The Committe on uniform specifications reported at this time (Com. Ex. 3235-N, O). At the meeting of June 14, 1904, it was voted that members of the Association refuse to "supply goods to a violator of a contract until the disagreement has been adjusted satisfactorily to the Claims or Adjustment Committee of the Association" (Com. Ex. 3235-S).

In December 1904, the membership in the Association represented 90% of the production capacity of the United States. From 1902 to 1911 the following companies were members of this organization:

Alma, Alpena, Alpha, Allentown, Alsens, American, Ash Grove, Atlas, Bonneville, Bath, Canada, Castalia, Catskill, Cayuga Lake, Central, Chicago, Coplay, Colorado, Continental, Crescent, Dexter, Dewey, Diamond, Dixie, Edison, Elk Cement & Lime, Empire, Egyptian, Fredonia, Glens Falls, German American, Great Western, Hecla,

Helderberg, Hudson, Huron, Illinois Steel (Cement Dept.), Iola, Iowa, Kosmos, Lawrence, Lehigh, Louisville, Marquette, Monarch, Martins Creek, Maryland, Nazareth, New Aetna, Newago, Norfolk, Northampton, Northwestern States, Oklahoma, Omega, Peerless, Peninsular, Pennsylvania, Penn Allen, Phoenix, Portland Cement of Colorado, St. Louis, Sandusky, Security, Southwestern States, Standard, Superior, Texas, Thomas Millen Co., Tidewater, Union Sand, United Kansas, Universal, Virginia, Vulcanite, Wabash, Wayland, Western, Western States, Whitehall, and Wolverine. (The Illinois Steel Co., Cement Dept., was incorporated about 1906 as Universal Atlas Portland Cement Company; Tr. 34919.) (Com. Ex. 3235-C to Z89.)

168. At the meeting of December 1904, a resolution was adopted fixing a minimum price of $1.00 per barrel at mill for the Lehigh District (Com. Ex. 3235-W). The meeting of April 1905, took up the matter of prices and uniform methods. Action was taken at subsequent meetings to regulate trade methods, standardization, discounts, sack returns (Com. Ex. 3235-R) and other terms and conditions. This was done progressively through committees, reports, deliberations, votes of approval and adoption, etc. (Com. Ex. 3235-X to Z-114). These activities were shown by these exhibits to have continued through December 1911. In the Lehigh Valley in 1909-10, according to Mr. Harding, of Coplay, there was price agreement and the price could not be changed except by the unanimous consent of eighteen men (Com. Ex. 3235-Z61).

License Agreement Association.

169. On December 30, 1907, the respondents hereinafter named and others entered into an agreement by which they organized themselves into the "Association of Licensed Cement Manufacturers" (Com. Ex. 3196-B). Membership was based on the non-exclusive contractural privilege of using a patented device for burning powdered coal in rotary cement manufacturing machines (Com. Ex. 3196-N, Z). These devices were controlled by the North American Portland Cement Company, organized for the purpose by Atlas, Lehigh, Alpha, American, Vulcanite, and Lawrence (Com. Ex. 3196-B). Through these license agreements, and implemented by the aforesaid Associa-

tion, each member agreed and was required to quote and sell only on delivered prices on particularly specified terms and conditions of sale. Distributing points, bag purchases and lists of minimum prices were agreed on and set out with great particularity, including a provision for destination prices figured on a common basing point (Com. Ex. 3235-Z36, Z54; 3196-RR to ZZ; Tr. 24023-31; 24987-25003).

170. The following were among the members of the "Association of Licensed Cement Manufacturers" when organized in December 1907: North American, Atlas, Lehigh, Alpha, American Cement Co., Vulcanite, Lawrence, Dexter, Pennsylvania Cement Co., Buckhorn Portland Cement Co., Penn-Allen Portland Cement Co., Nazareth, Catskill Cement Co. The addition of others was in contemplation of the parties (Com. Ex. 3196-Z). The following additional companies appear in a later agreement made in January, 1909: Bath Portland Cement Company, Glens Falls, Phoenix Cement Co., Edison, Whitehall Portland Cement Company, and Northampton Portland Cement Company (Com. Ex. 3196-GG).

Other Organization Activities.

171. In 1910 Mr. Duffield, of Wabash, reported to the Portland Cement Association as follows:

"The situation in Michigan is very satisfactory and growing more so. There was a chaotic state there early in the year. There was no unity of action at all among the mills until they formed a little association which comprises all the Michigan mills and one or two across the border. This has resulted in a free interchange of views and an understanding to the effect that the Lehigh prices should govern the prices out here. This understanding has been observed." (Com. Ex. 3235-Z59).

172. In 1919 the Portland Cement Association published reports of its Trade Practice Committee made to it in 1915, 1916, and 1917. These cover specific recommendations adopted by the Committee as to definition of a dealer, classification of buyers, dealer differentials, discounts, quotations to a dealer for delivery at other than his home town, contract forms for dealers' use, advance notice of price changes, price guarantees, conditions for sack returns, and freight payments therefor, credits and

other matters affecting policy and terms (Com. Ex. 3192, pp. 1 to 20; see p. 20 for list of respondents on this Committee). (See also Com. Ex. 3193, pp. 1 to 17, respondents' names on last page. There is a similar report published in 1915 by the Association of American Portland Cement Manufacturers; see Com. Ex. 3196-FF for more names.) (See Com. Ex. 3194.)

The Cement Manufacturers Protective Association was in existence in 1916 and was discontinued in 1924. This was another activity to which many of the respondents belonged (Tr. 24798-80). Its activities are involved in part in the case of *Cement Mfrs. Protective Ass'n* v. *U. S.*, 268 U. S. 588 (Tr. 24798-800; 24823-4; 24828; 24881; Com. Ex. 3188-A, B; 3189-A to D; 3190-A to C; 3191-A, B; see 3190-B for names).

173. After its organization in 1929, various meetings were held by the Institute at which matters of policy, including dealer policies and plans for sharing available business between members of the industry, were discussed, referred to, and reported on by Committees. There were many such meetings during the Code period, such as the following: Districts Nos. 1 and 2, June 22, 1933, New York, N. Y. (Com. Ex. 637-A to F; see rolls of names on all of these); at Baltimore, Md., March 1 and September 12, 1934 (Com. Ex. 637-G to Q), and at New York, N. Y., October 18, 1934 (Com. Ex. 637-R to U), February 13, 1935 (Com. Ex. 637-V to Y), and February 27, 1936, at which last named meeting a motion was carried for a voluntary committee to request the elimination by the New Jersey State Highway Commission of certain specifications for cement. The Portland Cement Association was requested to work with Mr. Gage towards the development of a rational specification for portland cement in New Jersey. A report from the Committee on Statistics was received at this meeting (Com. Ex. 637-DD to EE). The Bureau of Information of the Institute collaborated in other work with the Portland Cement Association (Com. Ex. 1032-D, 8th par.).

174. Four cement companies in southern California to wit: California, Monolith, Riverside, and Southwestern, organized for the purpose of being received as a division of the Institute and of collecting and disseminating credit, specific job contract, and production information as to stocks of clinker, cement, and cloth sack return as well

as other information determined upon from time to time in accordance with the Institute's Articles of Association (Com. Ex. 638-B, C). This organization was not accepted by the Institute as one of its divisions, but it continued to function as the Pacific Coast Cement Institute (Com. Ex. 638-AA, BB; 564-3Y; 638-U to Z; Tr. 8612; 8945). It renders monthly reports of business books, a quarterly report and current information (Tr. 8945-52; 3248; Com. Ex. 564-B to 3X). It also receives contract reports from its members, checks, contracts, and figures and disseminates land grant rates from information received from railroads (Com. Ex. 564-3R to 3V; Tr. 9133, 45; 9165 to 9174; 9187 to 9191). The following are also members: Superior, Santa Cruz, Pacific, Cowell, Northwestern, Olympic (Tr. 9151), Oregon (Tr. 8470).

175. About June 4, 1932, the very low base of $1.25 was found at LaSalle, Ill., and Cape Girardeau, Mo. (Com. Ex. 1121-F, G; Tr. 6308-9). During 1931 and the first half of 1932, many companies resigned membership in the Portland Cement Association because of the lack of a more complete membership and because some competing companies had resigned or because some were dissatisfied with competitive situations such as existed at Cape Girardeau, Ada, and other points in the Middle West (Com. Ex. 2967 to 2981; 2241; 2249; 2257). Marquette had been identified with considerable low selling (Com. Ex. 971-31A; 975-4G, 6P; Tr. 12393; 13047; 14006; 23286; 24587-8; 33234), and when Marquette rejoined the Association as of July 1, 1932, all of the others returned to the organization so that every manufacturer "within a radius of 300 miles of Davenport" belonged (Com. Ex. 2982-3198-B). Marquette's remaining in the Association was considered material by Missouri, whose president wrote: "If the Marquette Cement Mfg. Company's application is limited in membership to January 1, 1933, we would like ours to be on the same basis" (Com. Ex. 3094). Marquette's return was brought about at the Chicago meeting, July 11th and 12th, 1932, when Mr. Joseph S. Young and Mr. Rader interviewed Mr. F. G. Dickinson and got his agreement. The following companies also returned to the Association on condition that Marquette come in: Dewey, Missouri, Hawkeye, Universal, Medusa (Com. Ex. 3005-A to F).

176. The following were members of the Association as of August 1, 1932:

Allentown, Alpha, Ash Grove, Beaver, Calaveras, Cowell Portland Cement, Cumberland, Dewey, Giant, Glens Falls, Great Lakes, Green Bag Pennsylvania, Hawkeye, Hercules, Hermitage, Huron, Idaho, Kosmos, Lehigh, Lone Star, Louisville Cement, Marquette, Medusa, Missouri, Monarch, Monolith, Nazareth, Nebraska, North American, Northwestern, Northwestern States, Oklahoma, Olympic Portland, Oregon, Pacific, Penn-Dixie, Republic Portland, Riverside, San Antonio Portland, Santa Cruz, Southern States, Southwestern, Spokane, Superior, Superior Portland, Trinity, Universal, Valley Forge, Volunteer, Yosemite (Com. Ex. 3007-B).

177. The membership list of the Portland Cement Association, dated July 1, 1937 (Com. Ex. 3007-C), shows a few changes, i. e., three of the above members had dropped out, Republic Portland, Beaver, and Idaho, but the following new members were added:

Bessemer, Consolidated, Diamond, Florida, Georgia, Longhorn Portland, Peerless, Petoskey, Pittsburgh Plate Glass, Signal Mountain, Standard Lime & Stone, Standard, Wolverine.

Within a week after the Chicago meeting of July 11 and 12, 1932, or about July 19, 1932, the price of cement in the midwest rose 40c per barrel (Com. Ex. 1121-I; Tr. 6266; 14014-16).

Various Cooperative Activities.

178. In January 1915, pursuant to an agreement between Colorado and Lehigh, International prices became stabilized in the territory covered by Three Forks, Colorado, and Lehigh's Washington State plant, and territory governed by base prices as follows: Irving, Wash., $1.50 per barrel; LaSalle, Ill., $1.30; Mason City, Iowa, $1.50; and Iola, Kans., $1.10. Their agreement also covered terms and sack arrangements (Com. Ex. 3209-A to C; 3210-A to C; Tr. 20252-61; 25486; 25906-7; 27174-5). The Lehigh mills in this section are located at Mason City, Iowa, Iola, Kans., and Metaline Falls, Wash. (Tr. 26552); while the mills under the same ownership with Colorado, controlled by Boettcher, are: Arkansas, at Okay Junction, Ark.; Oklahoma, at Ada, Okla.; Nebraska, at Superior, Neb.; Three Forks, at Trident, Mont.; and Union, at Devils Slide, Utah (Tr. 12825; 13838; 13836-54).

Back in 1930-1, conferences and correspondence between competitors on price matters were not unusual. Mr. Hoenig, of Nebraska Cement Company, refers to Ash Grove telephoning him regarding Wyoming jobs and prices. They compared prices, checked, and concluded prices were "not being tampered with" (Com. Ex. 2237). April 2, 1930, Mr. Warner, vice president of Colorado, writes Universal complaining that Medusa violated the dealer policy which "has, of course, been established for some time" (Com. Ex. 2238). November 22, 1930, Nebraska sends Colorado a list of checked base prices and points which "Ash Grove and ourselves in this territory, and we are informed all others are quoting or will soon quote the same as International with no change in policy" (Com. Ex. 2239).

Mr. Boettcher, Ideal chain, wrote Mr. Wulf, of Monarch, on April 25, 1931, complaining that the latter had placed a base on the former's Nebraska mill. Wulf replied April 27, 1931, accusing the two Nebraska mills with cutting prices and "corraling all the major work" (Com. Ex. 2241, 2242). Subsequent correspondence shows that the matter was to be discussed at a meeting in New York City on May 12. Mr. Boettcher, evidently attended. Settlement at this meeting of the price situation was in contemplation. Mr. Sunderland writes: "My present conviction is that the five or six interests which apparently observed the published market at the recent Oklahoma bidding should get together as soon as possible * * *" (Com. Ex. 2242 to 2247).

179. Just prior to June 5, 1931, there was a meeting in Kansas City whereat a Committee of twelve was appointed to see various people about joining the Association under certain conditions. Mr. Rader, of Lehigh, promised Mr. Boettcher in Chicago to see what he could do to take off the base at the Ada plant. In fact, Mr. Boettcher was very anxious and insistent that his competitors change this base price (Com. Ex. 2248 to 2250; Tr. 12823 to 12828; 13757). At this time, April 1931, the Ada base was $1.00 to $1.03 (Tr. 12511; 12998; Com. Ex. 971-15A). In May 1932, the base was $1.75 (Com. Ex. 1121).

Mr. C. D. Nichols, vice president of respondent Oklahoma, on October 2, 1930, wrote Mr. Boettcher regarding a Baton Rouge letting: "Our prices will be very much higher and I am going to try to see the Lone Star people at New Orleans and see that they do not upset our playhouse on the prices as they did before" (Com. Ex. 2253-A).

180. Respondents in the northwest prior to 1928 sold f.o.b. mill. This was Superior's practice at that time, but on the entry of the Northwestern and Pacific coast companies into the Seattle area, it changed to a delivered price basis (Tr. 8386 to 8390). Pacific Coast Company was a new concern which erected a mill at Seattle about 1929. It sold for less than Superior's base price plus freight from Superior's plant at Concrete, and price cutting began and mill nets shrunk from $2.10 to around $1.00. Thereafter, about June 1931, Superior leased Pacific Coast's plant and prices went up (Tr. 8391-8408; 8428-9). Other mills joined in this advance (Tr. 8527-8).

181. Idaho had understandings in 1930 with several of its competitors respecting territorial boundaries (Com. Ex. 1196-A to E; Tr. 8418), while trade boundaries affecting Idaho, Three Forks, and Oregon competitors were adjusted through freight applications on the Union Pacific and Oregon Shore Line RR. (Com. Ex. 1196-O to T).

On January 3, 1936, the base price at Cleveland, Ohio, was raised from $1.50 to $1.65. This raise was made and dealers were telephoned on the same day by the various manufacturers operating in this territory. These included: Standard, Lehigh, Bessemer, Diamond, West Penn, Pittsburgh Plate Glass, and others (Com. Ex. 2380 to 2384; Tr. 33423; 27857; 37798).

North American informed competitors of its price changes (Tr. 34038-43). Nazareth secured lists of prices in the arbitrary zones direct from Lehigh (Tr. 28357-60; Com. Ex. 551-J to M).

182. Price lists were exchanged between competitors on the West Coast during the Code (Tr. 8474). After the Code, Oregon received price lists from Santa Cruz, Portland Cement Company, and Cowell (Tr. 8470-74), but Santa Cruz sends its price lists to competitors prior to the effective dates, and it receives price lists from the following competitors: Pacific, Calaveras, Cowell, Yosemite, Riverside, Southern California, California, Southwestern, Monolith, Oregon, and Beaver (Tr. 8634-7; 8786). It follows these competitors' prices in their territory (Tr. 8636; Com. Ex. 1211). Commission Exhibits 1211 to 1226 are price lists covering southern California, Arizona and Nevada, Northern California, Central California, Washington and Oregon. These price lists include the sub-Code period as late as January 1938 (Com. Ex. 1235 to 1255). These lists contain

prices which figure back to bases in most instances but indicate flat or zone prices in some sections (Tr. 8887-92; Com. Ex. 1280-A to G; 1290; Tr. 8916-18; Com. Ex. 1297; Tr. 9040-48; 8694; 8894-5).

183. Southwestern does not find it necessary to use freight calculations as it takes "the other fellow's price in all cases" (Tr. 8937-9), but would follow a lower price than one on Riverside's list if it should find one at a given point (Tr. 8953; 12848-51). Prices generally on the Pacific coast are identical delivered prices (Tr. 8532; 8618), and the multiple basing system is in use except in the zones (Tr. 8588; 8627; 8685; 8730). Terms are uniform (Tr. 8741-2). Salesmen in zone areas are furnished lists of prices as freight rate books are of no use where arbitrary prices prevail (Tr. 7514). Agreements were involved in the action of Lone Star, Alpha, and Lehigh in the use of a certain figure, $1.72, in bids to the Pensacola U. S. Naval Air Station, in April 1931. Lehigh's Birmingham office advised Allentown that "we were directly advised by Alpha that $1.72 is the figure they would use" (Com. Ex. 385-A; contra, Tr. 25045-8; 27049-54; Resp. Ex. 1353).

Mr. Crapo, of Huron, and Mr. J. B. Johns, of Medusa, discussed the question of a base price for Cleveland and the latter wanted the base at Buffington (Tr. 11034-5; 11380; 14690; 11480).

From 1931 to 1933, numerous meetings and conferences to regulate or suppress trucking were held at various times (Tr. 583; 601-3; 657-9). Some of these included meetings of railroad officials with representatives of dealer associations, the president of the Cement Institute, and others (Tr. 4590-4600; 4604; 4608-9; Com. Ex. 1043-A to 4V; Tr. 4620; 10949; 10961-73; 11461; 18830-9). (See also Tr. 36958; 37998-9; 41154, et seq.; 41625-8).

The Cree Incident.

184. In the Michigan area considerable friction arose between Messrs. Lingeman and Cree, general manager and sales manager, respectively of Aetna, on the one hand, and their various competitors on the other. Mr. Cree had been sales, traffic, and advertising manager of Aetna for twenty-six years, and had been a large influence in the growth of this company from a small obsolete mill just about ready to "fold up" and worth about $25,000.00, to a two-plant

concern with an annual capacity of 1,200,000 barrels and which was capitalized at $500,000.00, the second plant, at Bay City, Mich., being financed out of earnings (Tr. 495 to 504; Com. Ex. 45-A). This company was operated economically and employed water transportation and warehouses at various lake ports. A large following and a good business was built up by the two officials mentioned above (Tr. 505 to 512). Aetna's sales cost per barrel of cement was maintained around 4 or 5c, as against a usual average of 10c. The mills ran 70% of capacity when others were running from 20 to 24% (Tr. 506-8; 515).

185. Cree did not always conform to price patterns and endeavored to make Aetna's services superior to those of its competitors. Sometimes customers were given the benefit of economies (Tr. 513-17). Sometimes they were given allowances when taking cement from the mill in trucks; sometimes Aetna would sell a dealer not recognized by its competitors as a proper dealer (Tr. 795); sometimes Aetna would bid too low and secure orders its competitors regarded as not belonging to it, and generally Aetna's selling methods and policies were considered out of tune with those of its competitors (Tr. 513; 547; 568; 660-2; 671-2; 673-83; 715-25; Com. Ex. 42-A to S). Numerous complaints were sent by competitors to F. R. Johnson, president of Aetna, residing in Boston, Mass. Meetings between Aetna and its competitors were held at various times at which attempts were made to get Aetna in line and cause it to conform to policies to which they could all agree. Mr. Johnson attended some of these meetings. At one time, as heretofore reported, a low base was placed at one of Aetna's plants (Tr. 548; 636-7; Par. 106, supra).

186. Mr. Johnson attempted to straighten out Aetna's matters several times, and gave Lingeman and Cree orders not to tear down the price structure and to "play the game 100 per cent" (Com. Ex. 20-B; Tr. 559-66; Com. Ex. 33). In December 1935, at a meeting in Chicago, Johnson read a statement of policies relative to overproduction, following prices, warehouses, distributors, sales to dealers, shipping to Upper Peninsula of Michigan, etc. (Com. Ex. 44-A, B; Tr. 742). This policy was discussed and found agreeable by those at the meeting. These were: Ben Calvin and William Story, of Consolidated; J. B. John and Harry Lucas, of Medusa and Petoskey; Burt Rooney, of Huron; Frank Mooney, of Wolverine; Arthur Conkrite, of Universal;

Mr. Jennings of Wabash; D. C. Colburn, vice president of Marquette; William Russell and Mr. Luck, of Peerless; and F. R. Johnson, Oscar Lingemann, and Harold Cree, of Aetna (Com. Ex. 45-A to D; Tr. 748-55). This and other such meetings were held for the discussion and settlement between competitors of matters of price and policy in which some of the respondents named above were represented (Tr. 683; 705; 721; 744; 750).

187. Notwithstanding these meetings, understandings, formulations of policies, and agreements, complaints against Cree and his competitive methods continued to be made to Johnson who had previously (Com. Ex. 25-C, postscript; Com. Ex. 45-D, last par.; Tr. 716) stated that compliance with his policy of cooperation was a condition of Cree's retaining his job. In July 1936, without assigning reasons other than that he deemed it for the "better interests" of the company, Johnson discharged Cree (Tr. 519-33). Thereafter, one Calvin, formerly with Consolidated, and who sat in at the Chicago meeting of December 1935, was appointed general manager and a different attitude to competitors resulted (Tr. 849; 835-47). After his discharge, Mr. Cree endeavored to secure a position with other cement concerns, but was unable to do so. When it was suggested by his former secretary to Mr. Calvin that she did not believe Mr. Cree would ever get back with a cement company, Mr. Calvin said, "I know damn well he won't!" (Tr. 849-50; for complete story see Tr. 495 to 847; Com. Ex. 18 to 88-B).

The Institute was identified with one of the Cree transactions involving quotations to a dealer and filed prices in July and August 1935 (Com. Ex. 28-C; 29; 30; Tr. 661-2).

Opposing New Mills.

188. At various times respondents through and with the Institute have cooperated in combatting or discouraging the organization of new companies and the erection of new mills to compete with those already established in the industry (Tr. 4438-75; 24017-22). Under the first N.R.A. Code (Com. Ex. 557, p. 334), Article VII, the Cement Institute was required to investigate all proposals to construct or operate new plants, or increase the productive capacity of old ones, or to move all or part of a plant from one place to another. If the investigation into capacities,

consumption, and demand indicated that the over-production problem of the industry would be increased, the Institute could petition the President to prohibit the operation (Com. Ex. 557, p. 334). The Institute had a Committee on new plants and while some cases were taken to the President, it is not clear (Tr. 24844-6) that the action was always according to the procedure set out in the Code provision which was omitted from the amended Code of May 11, 1935 (Com. Ex. 560; Tr. 24844-6).

189. Chief among the activities to prevent new plants are those directed to the discouragement of Government projects (Com. Ex. 1032-D). In 1934, Dr. Arthur E. Morgan, Chairman of the Tennessee Valley Authority, hereafter referred to as "T.V.A.," decided that it would probably be to the advantage of the Government for the T.V.A. to build its own cement plant for the manufacture of all or part of the 10,000,000 barrels this work would require during a period of about eight years (Tr. 1933-4; 1960-65; 1977). Surveys and investigations were made and Major Edwin C. Eckel, Chief Geologist of T.V.A., selected possible sites for a cement factory in the Muscle Shoals region (Tr. 1930-33). At this point the Cement Institute, with John Treanor, of Riverside, C. F. Conn, president of the Institute, J. S. Young, of Atlas, J. R. Hanahan, of Volunteer, George Killian and Blaine S. Smith of Penn-Dixie, B. H. Rader, of the Institute, and others, including a committee from ten of the respondent companies (Tr. 2145), became very active in submitting data and arguments in discouragement of the erection of the Government plant (Tr. 1930-2176). Investigation was made as to the per barrel cost of manufacturing cement in the proposed plant (Com. Ex. 340 to 361-F).

190. After many hearings and conferences, an agreement was reached between the several respondents and the T.V.A. authorities whereby $1.30 was the maximum price the latter would pay for cement as a base price on the second nearest mill from the point of delivery. The basing point system with this modification was agreed on (Tr. 2116-7; 2162). During these negotiations, the Department of Justice, the Federal Trade Commission, the Departments of War and Interior, and the Code Authority of the Cement Industry were kept informed of the steps taken (Tr. 2002; 2162). The Government mill was not built (Tr. 1958; Com. Ex. 343-A, B).

191. The Cement Institute, through President George E. Coffin, on January 10, 1936, protested directly to Jesse H. Jones, Chairman of the Reconstruction Finance Corporation, against a proposed loan of $100,000 to the Washington-Idaho Lime Products Company for the erection of a new cement plant at Orofino, Idaho (Com. Ex. 1028-B). A similar protest was made from same to same on October 1, 1935, against a $300,000 loan to the American Portland Cement Company for the construction and completion of a plant at Foreman, Ark. (Com. Ex. 1029-A). Other protests were made. The Washington-Idaho plant was completed, but the Foreman, Ark., plant was not (Tr. 4440 to 4464; Com. Ex. 1028-A to 1029-G; 500-B, C, G, H; 942-B, C).

192. The Institute maintained a Bureau of Information which supplied individual members with matter they could use in opposition to new plants. The Bureau also collected and distributed new articles opposing new or state-owned cement plants, and it also sent information to special newspaper and magazine writers, and others (Tr. 4452 to 4464; 4468-4477). This Bureau also sent out the advertisements referred to in paragraphs 161 and 162 hereof, and publicly features as described in Com. Ex. 1032-C to F (See also Com. Ex. 1032-G, H).

193. Members and the Institute were active in opposition to the efforts of the Commercial Club and others, of Hartshorn, Okla., to rehabilitate the cement plant of the Choctaw Portland Cement Works, at Hartshorn, Okla. The newspaper announcement (Com. Ex. 197-Z) was sent to Col. Reynolds, of the Cement Information Bureau, and the contents of the article as well as pertinent facts and requests for reports were sent out by the Bureau to Oklahoma, Ash Grove, Trinity, Monarch, Lone Star, Universal, Lehigh, Missouri, International, and Mr. Lebaney at Kansas City (Com. Ex. 197-A, B, E, P, Q, V, Y, Z). Monarch informed the Bureau, February 6, 1936, that "We are vitally interested in discouraging anybody in such an enterprise" (Com. Ex. 197-Q). Other respondents were interested. The plant was never put in operation (Tr. 4450 to 4460).

194. Similar action was taken by the Institute and its Bureau in the following cases: (1) against the Government cement plant in Puerto Rico (Tr. 4471); (2) against promotion of the Ohio Limestone & Portland Cement Company for a new cement plant in Lawrence County, Ohio

(Com. Exs. 415-41; 573-L; 812-S, a case under the Code procedure); (3) against the Northwestern Portland Cement Company's mill (Tr. 8589-90), and against several other proposals for new mills and companies (Tr. 4466-72; 24019-22; Com. Ex. 553-2M).

195. In addition to the Institute and others, hereinbefore mentioned, the following were shown to be active in this opposition work at various times: John B. Reynolds, Manager, Cement Information Bureau (Com. Ex. 197-A, Monarch Ex. 197-B, P) Ash Grove (Com. Ex. 197-E), Superior (Com. Ex. 415-41), Arkansas (Com. Ex. 415-28), Boettcher (Com. Ex. 415-27), Joseph S. Young, Lehigh (Com. Ex. 415-22), Treanor, Riverside (Com. Ex. 553-2M), and Affleck, Universal (Com. Ex. 553-2M).

Collective Bidding.

196. In 1932 four respondents, to-wit: California, Monolith, Riverside, and Southwestern, made application to the Department of the Interior for permission to put in a joint bid whereby each would supply a part of the cement requirements for the Hoover Dam, or Boulder Canyon project. The matter was referred to the Comptroller General who ruled that such procedure would not contravene Sec. 3709 of the Revised Statutes (relating to bidding and Government purchases), but the decision was based on the assumption that there was nothing involved which would violate any other law (Tr. 1343; Com. Ex. 128-C, B). These respondents, on January 2, 1932, entered into a contract with each other as to the joint bid and conditions of making bond and carrying out the enterprise (Com. Ex. 1280C to G). They appear upon the price and submitted the joint bid, which proved to be low one, and the contract of January 1932, was awarded to them, Com. Ex. 129; Tr. 1339 to 1345). These companies continued to cooperative in this way, and in March 1934, they submitted a common low bid and secured an award for 1,400,000 barrels (Com. Ex. 134-C, D; Tr. 1362-72; see also Com. Ex. 135 covering identical biddings in April 1937; Com. Ex. 1328-58; 1362-80).

The Burns and Clark Studies.

197. In addition to its activities in collecting and disseminating material for combating new mills and adverse public opinion (supra)), the Institute, through its Marketing Research Committee, caused a detailed study to be made of the basing point system of marketing as practiced by the industry. This was made by Professors Arhtur R. Burns and John M. Clark, of Columbia University, widely known and recognized economists (Com. Ex. 953-N). This Committee consisted of F. M. Coogan, vice president of Alpha, J. S. Young, president of Lehigh, Blaine S. Smith, president of Penn-Dixie, vice-chairman, and John Treanor, president of Riverside, chairman. The Committee assisted the professors in preparing questionnaires, supplying information, and in meeting with them for discussion (Com. Ex. 956-3P-18P; 958-U, Y).

198. This survey was begun about October 1934, and continued to about June 1937. These eminent economists were told at the time of their employment that the industry wanted this subject "competently and impartially investigated" with the idea of accepting modifications of the basing point system or of adopting a better system if found desirable (Com. Ex. 956-3P), but the Committee appears at times as an advocate desiring to bring the professors to its point of view. Chairman Treanor, in a letter to Blaine S. Smith, September 11, 1935, says, respecting Drs. Burns and Clark: "* * * our main points have been established in their minds, to wit, the importance of 'overhead' and 'idle capacity' in our industry, which make old fashioned unrestrained competition simply unworkable and some form of market control necessary" (Com. Ex. 913-4H). However, Mr. Treanor tells Dr. Clark in a lengthy letter of August 27, 1935, that the only restraint he desired was "enforcement of the rule that no sales should be made, directly or indirectly, excepting at the price which the seller holds out to the world as his invariable price to one and all" (Com. Ex. 958-D, pp. 2, 3).

199. The members of this Committee submitted suggestions and tentative answers to each other before sending them to Dr. Clark (Com. Ex. 913-4H). The objective of these committeemen, including Mr. Treanor, was stated by Mr. Blaine S. Smith to be "to mold the professors' minds before any definite conclusions have been reached" (Com.

Ex. 571-2L, 4th par.). The report of Professors Clark and Burns was not put in evidence, as it was not produced when subpoenaed, but a wealth of material, including answered questionnaires and correspondence was received in evidence and is referred to throughout this report (See Com. Ex. 967 to 976 inclusive for some of this material). It was not shown that this survey was ever made use of as the basis of publicity, change of selling methods, or otherwise.

Price Filing.

200. Under the N. R. A. Code, respondents filed prices and terms, as required in Article IX of the Code of November 27, 1933 (Com. Ex. 557) and later as required by Artivle VIII of the Amended Code of May 11, 1935 (Com. Ex. 560). These provisions required all members of the industry to file its prices and terms with the Code Authority. Said prices and terms were to become effective five (5) days after filing and a member could not sell below the price or deviate from the terms so filed until five (5) days after filing new prices or terms, unless it were to meet the lower price or more liberal terms filed by a competitor. In any case prices and terms filed or met are broadcast to the trade (Com. Ex. 557; 560). Although not required by the Code, the Code Authority and Institute practice under these provisions involved the prompt reporting to all interested competitors all prices and terms filed. A member expecting to bid lower than the going price at the proposed point of delivery would file its prices five (5) days prior to the letting. This price would then be relayed by the Code Authority to all interested members so they could, and did, bid the identical price (Tr. 3064-6; 3821-9; Com. Ex. 163-A to R; 164-A to DD; 911-A to V). In case of the filing of a new low price by a member, the Code Authority would advise the filer of the existence of a prevailing higher price to see if the lower filing was based on a lack of information, maybe, or was a mistake (Tr. 3064-6; 3821-9; Com. Ex. 911-A to V; Tr. 16992-97; Com. Ex. 753-A to P; Tr. 3495). The Amended Code, adopted May 11, 1935, required this information to be sent by the Code Agent to all interested members of the industry by telegraph or other means equally as prompt (Com. Ex. 560, Art. VIII; Tr. 16992; see also Tr. 33447-9.

201. After the Code, prices and terms were filed and the information sent out by the Trade Practice Committee of the Institute for a time, although the Code procedure after the Schechter case and after the Trade Practice meeting in Chicago, September 1935, was voluntarily followed (Tr. 3067-78; Com. Ex. 590 to 592-B; Tr. 3119 to 3135; Com. Ex. 594; 600-A; 561). Increases in price broadcast to the trade are always made effective five (5) days after the date of the notice. If competitors broadcast similar quotations, indicating they are following the raise, the price is permitted to stand; otherwise it is withdrawn (supra). It appears that the Institute discontinued price filing when it began disseminating land grant rates to its members some time after December 1, 1935 (Tr. 3712).

Contract Checking.

202. For many years cement has been supplied by respondents to contractors on written contracts covering the requirements for particular jobs. These are based on quotations furnished the contractor prior to his making up his bid or estimates of building costs, and the contract protects him from loss in case of a rise in the price of cement, for he continues to buy for the specified job at the contract price. Some contracts, however, gives the contractor the benefit of a price reduction. But a rise in cement prices during the pendency of a specific job contract creates the opportunity for the contractor to order more cement than he needs. His contract price is below the market price and he can use the cement to advantage on other jobs secured at figures based on the higher cost of cement; or he can resell the cement at less than the prevailing price and still make a sales profit. This sometimes resulted in over supplies of cheap cement and an unsettled price situation (Tr. 4196-4207; 16748-57; Com. Ex. 1013-A, B; Com. Ex. 128; 193).

203. To prevent the aforesaid deceptions and unwanted results the industry advocated "enforcement" of specific job contracts as early as 1908, and probably prior thereto (Com. Ex. 3235-Z20 to Z22), and in recent years the practice of contract checking, referred to in the old case of Cement Mfrs. Protective Ass'n. *vs.* U. S., supra, has been employed by agencies of the industry. Contract

checking consisted of inspections and surveys by engineers and others in the process of ascertaining whether or not all the cement furnished under a contract was being used for the purposes agreed on and whether contractors in times of low prices had secured duplicate contracts in contemplation of higher prices (Com. Ex. 1070-B; 141-27, 28, 63, 65, 77). These activities were provided for in the first Articles of Association of the Institute (Com. Ex. 138-B), which required members to make regular reports of all specific job and other contracts (Com. Ex. 138-K). Later the Codes provided for contract checking (Com. Ex. 557; 560), as did the new Articles of Association adopted by the Institute December 11, 1935 (Com. Ex. 561). Contracts were checked at various times and the results reported by the Institute to members of the industry. Sometimes contracts were cancelled as the result of information obtained in the course of checking (Com. Ex. 137-S; 137-G to V; 2198-99; Tr. 48180-96; contra, Tr. 36500).

Returned Sack Allowances.

204. Terms and conditions for the return of cloth sacks or bags in which cement is shipped has presented difficulties to the trade for many years and has been discussed by respondents and others in meetings and elsewhere since 1902 (Tr. 26530). Prior to the Code, difficulties arose over variations as between competitors of amounts allowed for returned bags, as differences in such allowances were in effect differences in price. Such variations might take the form of liberal counts, or the reception and payment therefor of damaged sacks, or sacks not originally furnished by the seller (Tr. 4533-4; 23406). In 1904 and thereafter the Association through committees dealt with various features of the subject, and in 1905 the Association adopted a report fixing 10c each as the amount to be added for cotton sacks and 7½c as the return allowance (Com. Ex. 3235-Z7, 8, 9), and at various times the Association and its successors regulated conditions for sack returns relating to count, inspection, and other particulars (Com. Ex. 3192, p. 18; 3193, p. 11; 3235-Q, R; 8Z; 3236-D). In 1934 the various branches of the Institute checked sack returns and made reports thereon. Whether manufacturers were allowing 100% bag returns or maintaining some fixed percentage of rejection was

the subject of inquiry at a meeting of Districts Nos. 1 and 2 in 1934 (Com. Ex. 637-P). Returns were regulated under the Code and the return price of 10¢ per sack has obtained for some years (Com. Ex. 556; 557; Par. 148-50 and citations; Tr. 4533-4; 6031; 6406; 23406).

At various times in the early days manufacturers insisted that customers should be required to pay freight on sack returns, and the Association's Bag Committee in 1904 referred to its activities in causing customers to meet this expense and in thus saving members much money (Com. Ex. 3235-Q, R). The requirement was in force in 1915 (Com. Ex. 3193, p. 11, and quotations and invoices contained this condition prior to 1925 (Resp. Ex. 563; Tr. 23405-6). Then Alpha founds that competitors were using the return freight item as a talking point against mills that were further freightwise from the customer. The long freight haul for the return sacks made a final cost variation as between competitors, giving near mills a competitive advantage. Alpha thereafter announced the policy of crediting the customer with the full amount of this expense (Tr. 23405-6; Resp. Ex. 564; 565; 610). Competitors met the new policy (Resp. Ex. 60; 661; 641; 647; 638) which was later provided for in the Code contract form (Com. Ex. 560, p. 29).

Reciprocal Shipments.

205. On occasion and in circumstances where it would be convenient, desirable, or advantageous to do so, some respondents made shipments for the account of other respondents. Under the basing point system delivered prices at a given point were the same from a near mill as from a distant mill, so shipment from the near mill for the account of the far mill, which had secured the order, resulted in a saving of freight with extra profit or saving to either or both mills, depending upon the conditions agreed on (Tr. 4204; 4430-7; 8140-4; 12408-9; Com. Ex. 2176-7; 2180; Tr. 12239-42; 14338-66; Com. Ex. 2621-23; 2875-77; 2879-86; 2902; 3093-A to 12-I). Marquette received larger mill nets on cement shipped by Kosmos for its account (Tr. 12408-10).

206. Respondent Vulcanite sells quantities of cement made by Hercules and shipped from the latter's mill. Medusa has since July 1932, manufactured and shipped all the

cement sold by Castalia (Com. Ex. 2804-A, B; Tr. 10545-68; 40450-54; 40552-54). These transactions are not all based on freight saving considerations. Shipments by one mill for the account of another were considered in Mr. Mallory's plans for allocating business and numerous cases of such shipments were reported by him and included in the statistics so as not to confuse the percentages (Com. Ex. 577-PP, QQ; 2879 to 2886; 808-DDD, par. D. LLL, MMM; Tr. 19050-61).

Standardization of Product.

207. At the second annual meeting of the Association of American Portland Cement Manufacturers, held in New York City December 13 and 14, 1904, representing 90% of the production capacity of the United States, Mr. Lesley (America) said, in reference to standard cement specifications which had previously been adopted:

"* * * I believe as we have adopted these specification, that they will go out as the nearest we have come to any regular defined standard specification in the 25 years I have engaged in the manufacture of cement. This will certainly give us a common ground in the cement business on which we can meet, and will enable a standard uniform article to be made at a uniform price, and anything outside of this standard article, will represent additional cost for additional trouble to meet the whims of any individual. I certainly trust this will be dealt with as a commercial question, as well as an engineering one." (Com. Ex. 3235-U; see also 3235-N).

208. The Code of Ethics, adopted at the organization of the Institute, refers to the benefits of standardization and says:

"Therefore, it is declared that all portland cement manufactured and sold shall be guaranteed to meet the existing standard specifications of the American Standards Association, and the United States Government Master Specifications * * *."

(Com. Ex. 138-P). The various N.R.A. Codes (Com. Ex. 557; 560) and the Compendium adopted after the Code (Com. Ex. 561), contain standardization requirements that are essentially the same as the one quoted. These are minimum standards to which all of respondents' cement conforms but some cements are superior in many

respects to others which were regarded as standard (Tr. 48364-79; Com. Ex. 2850-C; Tr. 6116, 3886, 13673). One brand is often preferred over others because of color, workability, or other individual characteristics (Com. Ex. 968-8D, 18C). Nothwithstanding these differences, the price of the various brands of cement is the same (Tr. 3888-9). A great deal of publicity is given to the claims that the qualities of the various cements are practically identical, and that they meet a standard specification (Tr. 3886-7). It was considered a violation of the Code for a member to give guarantees beyond those of the standardization clause mentioned above (Com. Ex. 977).

209. The foregoing requirements apply to one standard grade and not to special cements which were sold at higher prices. "Incor," "Strongfast," and "High Early Strength," are terms applied to extra quality cements which sell at a higher price than standard cement, and are manufactured to different specifications. "Incor" was made and sold by Lone Star and was the subject of serious concern to the industry in 1930-31 (Com. Ex. 2370; 2371; 1081-W, DD, EE; Tr. 48345; 48425; Com. Ex. 556, p. 12; Tr. 22969; 48359-60; Resp. Ex. 402-A to 409-P).

210. The Portland Cement Association was still working on the problem of standardization in 1930, when it had a committee on Cement Specifications of which Mr. Charles F. Conn was Chairman (Com. Ex. 1081-W, DD), and the Association and members of the industry were predominating influences in establishing the prevailing standards (Tr. 26299; 28632-5; 48331 to 48379). The foregoing references show that standardization, aside from its desirability as a common factor in the matter of pricing, is a means of reducing expense, and the record shows that the quality has been improved considerably since 1904 when the standardizing process began (Resp. Ex. 406 to 422; Tr. 22830-8; 26195; 26349-50; 29043; 38928-9, and supra.

211. The "common ground" feature of standardization is stressed by President John L. Senior, of Consolidated, who on November 14, 1930, wrote to Mr. Conn, chairman of the Associations Committee on Cement Specifications, criticizing members for publishing advertisements claiming special features of desirability for their products (Com. Ex. 1081-DD). Copies of the advertisements criticized were sent with the letter (Com. Ex. 1081-X to CC).

Among these is the advertisement of Ash Grove claiming greater tensile strength than standard specification requirements, as well as other features rendering its product more desirable to the consumer (Com. Ex. 1081-BB). Mr. Senior complains as to this exhibit: "The advertisement of Mr. Sunderland simply promotes the raising of standard specifications continuously." At a later date an "Incor" situation was disposed of following a meeting at the Biltmore Hotel, New York, on December 8, 1931, which action was said to have the effect of "saving the Industry" and which meeting the following industry officials attended: Messrs. E. J. Mehren, Claude Boettcher, Charles L. Hogan, J. B. John, Morris Kind, Hiram Norcross, Joe L. Young, H. Struckmann, Mert Coogan, Fred Stone, B. F. Affleck, Charles Schmutz, Blaine S. Smith, Coffin, and John L. Senior (Com. Ex. 2370; 2371). Standard specifications for high early strength cement were adopted about 1930 (Tr. 48360-3).

Production and Shipment Statistics.

212. Prior to 1905, month-to-month reports as to production and stocks were submitted to the Association of American Portland Cement Manufacturers by its members. These were collected and sent out by Mr. Goodell, of the Engineering News, acting, it was stated, in his individual capacity and not for the Engineering Record. There had been objection to the figures appearing in this periodical, and it was stressed at the Association meeting that it would do a great deal of harm for these figures to get into the hands of contractors and dealers (Com. Ex. 3235-O, Q). In the report of the Executive Committee of the Association, December 1904, the following statement appears: "To obtain better prices, it is absolutely necessary that we should refrain from stocking up during the winter months and avoid, as far as possible, the naming of prices in advance for next season's delivery (Com. Ex. 3235-U). This meeting, after references were made to the good the statistics were doing, adopted a resolution providing for the submission after January 1, 1905, of statistics expressed in barrels twice a month with comparisons as between the same months of 1904 and 1905 (Com. Ex. 3235-W).

213. In 1910 reporting was monthly, and it was settled

by vote of the Association that reports should contain figures of production and shipments in a lump by districts together with percentages of increase or decrease over the preceding year (Com. Ex. 3235-Z52 to Z 59). These were to be confidential and to be disseminated only in totals by districts and percentages (Com. Ex. 3235-Z58).

214. At the semi-annual meeting of the Association in June 1911, Mr. W. S. Mallory, then president of Edison, and chairman of the Association's Committee on Statistics, made a report on production and consumption of cement, and submitted totals for the industry for January 1 to May 31 periods of the years 1906 to 1911 inclusive, covering cement manufactured, cement shipped, and total increases. Increased or excess production for the 1911 period amounted to 3,700,000 barrels, over twice as much as the preceding year. He also reported totals of cement and clinker on hand June 1 for each of these years, and went into details on the business outlook as indicated by building permits and other factual data. Mr. Mallory cited his prior successful predictions as to consumption of cement in previous years, and stressed the excessive production and stocks on hand for the year just ended in urging the necessity for their reduction to prevent lower prices. He stressed the danger of price cutting, and a price war that would follow unless production were held in check. He then announced for his company, Edison, that it would shut down its plant when it had accumulated a surplus of 200,000 barrels, or practically a month's supply (Com. Ex. 3235-Z102). He suggested that it would be illegal for the members to agree to do this, but said further: "Without presuming to advise, I cannot help saying that it seems to me that every company represented here could do the same thing. If they would do so, that would be a form of cooperation that would be very effective in remedying conditions * * *" (Com. Ex. 3235-Z100). Mr. Mallory's statement was applauded and a vote of thanks was moved and agreed to for his very able and lucid report (Com. Ex. 3235-Z102). (See Com. Ex. 3235-Z93 to Z104 for the entire statement and colloquy).

215. Thereafter, from about 1916 to 1925, statistics collected and disseminated by the Cement Manufacturers Protective Association contained the production and shipment figures of individual mills (Tr. 17211). From July 1926, to August 31, 1933, Mr. Mallory conducted a statistics service to which the following respondents subscribed:

Aetna, Allentown, Alpha, Arkansas, Ash Grove, Bessemer, Consolidated, Coplay, Cumberland, Dewey, Diamond, Edison, Giant, Glens Falls, Great Lakes, Green Bay, Hawkeye, Hercules, Hermitage, Huron, International (Lone Star), Keystone; Kosmos, Lawrence, Lehigh, Marquette, Medusa, Missouri, Monarch, National, Nazareth, Nebraska, North American, Northwestern States, Oklahoma, Penn-Dixie, Petoskey, Pittsburgh Plate Glass, Southern States, Southwestern, Standard, Superior, Trinity, Universal, Volunteer, Vulcanite, Wabash, West Penn (Comm. Ex. 3008-A to C; Tr. 17199-203).

The Mallory service developed relations between prices reported by the Bureau of Mines and production, capacity, and clinker production. After 1932 he received statements from his subscribers and disseminated data with respect to each mill, using key numbers to identify the individual mills, which numbers were known to all subscribers and were afterwards used by Professors Burns and Clark in their survey (Tr. 17207 to 17213; Com. Ex. 1025-C).

216. On September 1, 1933, Mr. Mallory was employed by the Institute as Chief Statistician and his statistical service was continued as an Institute activity (Tr. 17197-209). In 1929 the Institute was advancing the idea of all members reducing their output to 70 percent of capacity as advocated by Mr. Mallory, the capacity being arrived at by averages taken from the highest volume produced in any three consecutive months of the years selected (Tr. 17216-29; Com. Ex. 1270-A, B, J).

Thereafter, during the Code period, Mr. Mallory submitted recommendations, calculations, and statistics on the proposed idea of adopting some plan for sharing available business, which activity was authorized by the Code (Com. Ex. 557; 808-MM to ZZZ; 821-2E to 2K; 2917-A to O). The Institute considered several proposals for allocating business, including the "Mallory Plan," but there was much disagreement as to the rated capacities as bases for the proposed divisions, and all propositions were rejected by vote in 1934 (Tr. 17488-92; 17393; Com. Ex. 808-BBB).

217. The United States Bureau of Mines has for some years collected and disseminated data concerning prices, production, shipments, stocks, and other particulars of the manufacture and sale of cement. These are reported monthly and are furnished to the manufacturers and mem-

bers of the general public. The figures are compiled by districts from reports of individual mills. The district totals are given out but the figures relating to individual mills are strictly confidential and are not given out to any one (Tr. 57 to 65; Com. Ex. 3).

218. Institute data collected or disseminated since the Code goes further than the Bureau of Mines in that it gives the figures as to production, shipments, capacities, etc., of each mill, and renders these intelligible to all members by use of the aforesaid key numbers. It does not give these figures to consumers or the public. From these reports it can readily be determined just what percentage of rated capacity each mill has shipped, and all competitors are informed as to the intimate details of a given mill's business (Com. Ex. 670-6H; 1025-A to E, G, H; 2895-A to D). The dissemination of these data as to individual mills was considered improper and was opposed by Mr. Sunderland, president of Ash Grove, and Mr. Wecker, president of Marquette (Com. Ex. 1025-M, G, H; Tr. 13662-9), who refused to submit particular data as to their companies in July, 1936, except with the understanding that particular details would not be disclosed (id.). Marquette was shown by one report to have shipped 91.6% of capacity as against a district average of 69.3% (Tr. 17357; 25011).

One purpose of his reports was stated by Mr. Mallory as follows:

"I have no knowledge as to the actual value the reports have to the companies. However, they are issued in the belief that they help the companies by eliminating their suspicions in connection with what their competitors are producing and shipping * * *."

(Com. Ex. 2879; Tr. 17235-7; 17355-7). (See also Com. Ex. 821-EE to GG, WW to ZZ; Tr. 17368). The Bureau of Mines figures were stated to be sufficient but Mallory's report was desired because it came a few days earlier (Tr. 26239; 27653; 28700). (See also Com. Ex. 1026-A to E, as to kinds of reports made to the Bureau of Mines, the Institute, or the Association; Com. Ex. 831-J; 870-6H; Tr. 4421-4).

219. Form 1930 to 1937 total cement production has exceeded total shipments by about one-half of one percent (Tr. 17496). Prior to Mr. Mallory's activities, in the periods of 1906 to 1911, for which he gives the production and

shipment totals, the percentages of production over shipments were: 7.4% for 1906; 10.5% for 1907; 18.5% for 1908; 10.9% for 1909; 5.7% for 1910; and 14.2% for 1911 (Com. Ex. 3235-Z95).

Mr. Mallory repeatedly contended and furnished statistics and arguments to show that:

"The theory that it is good business to increase the volume of shipments of any company in excess of its quota share by cutting the market price in order to reduce manufacturing costs is a very costly fallacy, not only for the company but also for the entire industry."

(Com. Ex. 821-E; Tr. 17296-306). Respecting reduction of output, Mr. Mallory asks every managing executive how he can "expect any stabilization in the cement industry with a living market price unless he is willing to have his company 'give something (cooperation) to get something'" (Com. Ex. 821-J). The advantages of curtailment of production and its effect on prices were conceded by members of the industry (Com. Ex. 1270-A; 1430).

Secretive Methods.

220. Some respondents were shown to have taken steps to conceal identity on some of their business transactions. Aetna received many unsigned communications from competitors. These would often have cards or slips of paper attached which indicated the source (Tr. 776-85). Other letters were marked "please destroy." Such communications ordinarily related to prices, trucking, and the like, and when sent out by Aetna, copies were not kept. Plain paper and plain envelopes were used in transmitting memoranda (Tr. 1508-9; Com. Ex. 1494-A). Incoming letters containing information which might interest the Government were thrown out (Tr. 851-63). Many telephone messages between Mr. Calvin, of Aetna, and competitors, related to prices and bids. Frequently it would be asked over the telephone if some particular price was right (Tr. 860-3; 892-900; contra, Tr. 30178-81). Complaints were made to Mr. Johnson, president of Aetna, by its competitors that they could not find out what Aetna was doing as Cree and others in the company would not give satisfactory answers. Mr. Johnson corrected this situation (Tr. 1052; Com. Ex. 20-A). Letters were taken out of files at various times (Tr. 1902-4; 13568; 14420; 20429).

221. Lone Star's General Manager, Mr. J. F. Neylan, impressed members of his force with the value of caution in writing about competitive matters. In a circular initialed by him and addressed to E. S. Morgan and J. B. Oldham, he says in part:

"* * * If there is anything of a strictly confidential nature, such as personal talks had with representatives of your competitors or any information of a character that might possibly be subject to criticism and might, under a strictly legal interpretation, be classed as evidence of collusion, it can be handled by a pencil note which can be attached to your regular report and which we will detach in this office and destroy * * *."
(Com. Ex. 2422; Tr. 33263-66).

222. Mr. A. E. Hjerpe, for Cowham Engineering Company, involved in the management of Signal Mountain, Trinity, Florida, and Consolidated (Tr. 13370), agrees with Mr. J. F. Hayden in his aversion to the employment of recording processes in matters relating to retail dealers associations. These matters will be handled, he says, "on a strictly personal and oral basis" (Com. Ex. 2367; 2368; Tr. 13321-73).

Penn-Dixie sent an inter-office memorandum marked "Personal—No Copies," in which it is stated that Lone Star, in refusing to eliminate the Ironton base, was acting "contrary to the general practice of all the other southern mills and contrary to the understanding we had" (Com. Ex. 1189; Tr. 23127-31).

223. Lehigh's Birmingham office in 1931 cautions "no copies" on letter to its Allentown office containing the following: "Our reason for quoting $1.72 is because we felt reasonably certain that Lone Star would use that figure and because we were directly advised by Alpha that $1.72 is the figure they would use * * *" (Com. Ex. 385-A). The statement was denied on behalf of Alpha (supra).

Mr. L. C. Newlands, vice president and general manager of Oregon, wrote, on May 22, 1930, to Mr. Boettcher, president, Colorado, et al., beginning as follows:

"I sincerely wish that I might see you for there are a number of things I should like to talk over with you, things that may not be said in letters."

The remainder of the letter is confined entirely to matters relating to the cement business. The postcript says: "Am keeping no copy of this letter" (Com. Ex. 2251-A, B).

Aetna received unsigned memoranda relating to trucking and prices (Tr. 12554-77; Com. Ex. 2202; 2203).

That the Institute wished to conceal from salesmen its connection with contract data sent daily to members, appears from Mr. Reiter's letter to Pittsburgh Plate Glass which states its purpose "to avoid the implication that the Cement Institute has any authority in the control of contract obligations" (Com. Ex. 1932).

The Price Issue.

224. Testimony as to what manufacturers, dealers, and economists understand by the term "price" was received for both sides. Some were shown to regard price as the amount received by the mill after freight had been deducted. This amount, as shown by both sides, remains constant for a base mill on all sales within the territory controlled by its base price, but it varies with every sale to different points outside of such territory. Others regard price as the sum of mill net and freight which goes to make up the total amount the vendee has to pay to own the cement at the point of use. Manufacturers and others were shown to have used the term "price" in both senses.

The facts of price, where basing point methods are employed, as shown by the evidence and not seriously controverted, are:

(a) Vendees were quoted a figure which applied only at the point of delivery and which included freight (infra);

(b) Invoices showed this total amount and stated thereon the amounts of freight which might be deducted and which was subtracted on the invoice to show the balance to be remitted to the vendor (Com. Ex. 2663, p. 35; 2673; 2677; Tr. 4043; 5173; Com. Ex. 1074-A, B; Tr. 6111);

(c) The vendee was requested to pay the freight to the carrier and to send the paid expense bill to the vendor for credit and comparison (Com. Ex. 1074-A, B; Resp. Ex. 2789-A to M; 2735-A to C). The vendor did not guarantee safe delivery of the goods (Id., Com. Ex. 250-B; Tr. 2340; 6111; 4031; Com. Ex. 3201-A to F) and the vendee would not ordinarily return the paid freight bills (Tr. 38241-2);

(d) Some vendors received from their customers claims against carriers and undertook to secure proper adjustments for them (Tr. 30357-60). Claims for freight overcharges or damage were thus taken care of by vendors (Resp. Ex. 2733; 2735-A, B; 2753);

(e) Figures quoted for delivered shipments by any respondent did not vary as between customers at the point quoted, but the mill nets of such vendor would vary as between customers at different points (Tr. 11423-5);

(f) Some dealers were in competition with other dealers at other locations or freight rating points (Com. Ex. 202-W; Tr. 6734; 38240) and many steps were taken as heretofore reported to prevent these dealers from having an advantage over such competitors (Tr. 7697-7702);

(g) In recent years respondents' terms required freight to be "paid by the Buyer for the Account of the Seller" (Resp. Ex. 2730-A, B, J, M, N; 2752; 2755-A). The cited exhibits range in date from December 26, 1936, to the present time. Similar quotation and contract blanks without the stipulation are dated from February, 1931, to November 20, 1937 (Resp. Ex. 2730-O, C; 2769-B). The contract form adopted in The Compendium contains the clause (Com. Ex. 561, p. 23). This payment for the account of the seller did not, however, cause the railroads to make any report or accounting to these shippers regarding freight paid by the buyers (Tr. 37044), nor does it appear that such instructions changed any practices respecting the shipments (Tr. 37155-6; 38241-3; 35277).

(h) More recently vendors have adopted a policy of prepaying all freight. This began since the complaint in this case. (Tr. 29863; 39538-40) and is a reversal of the rule contained in The Compendium forbidding the prepayment of freight except to stations where it is required by the carriers or on U. S. purchases (Com. Ex. 561, p. 16, Sec. 8).

Expert Economic Testimony.

225. Many able and interesting economists, acknowledged authorities in their fields, testified on the economic aspects of the basing point system, marketing methods, competition, and public interest affected by the economic aspects of practices employed by members of the cement industry. These are as follows:

For the complaint: Frank A. Fetter, Tr. 17634, et seq.; Jacob Viner, Tr. 15613, et seq.; Edward A. Duddy, Tr. 15258, et seq.; Benjamin H. Hibbard, Tr. 15413, et seq.; and E. G. Nourse, Tr. 48133, et seq.

For respondents: Dr. Clare E. Griffin, Tr. 43056, et seq.; Roland S. Vaile, Tr. 44087, et seq.; Fred R. Fair-

child, Tr. 44610, et seq.; Ray B. Westerfield, Tr. 45474, et seq.; and Evald T. Grether, Tr. 45792, et seq.

226. Following are brief references to some important features of this opinion evidence.

The Commission's expert testimony is to the effect:

That the basing point system substantially as alleged in the complaint is not what the science of economy or these economic experts would recognize as a competitive system (Tr. 15641-44; 17754-7);

That, according to any business behavior observed by economists, such a system could not arise spontaneously as a result of competitive forces, but certain of its elements would have to be planned and some disciplinary machinery would be required, such as the practice of establishing a lower basing point at another mill (Tr. 15664-7);

That the price of a commodity sold at a delivered figure to a buyer who pays the freight and remits balance to the seller, is the price realized at the point of production after the freight deduction (Tr. 15676-9; 17657);

That agricultural products are not sold on the basing point plan and that the methods employed in the sale of wheat are entirely different from those alleged and described (in advertisements) as applying to the sale of cement (Tr. 15259-241);

That identity of price, or "matched competition," could not arise from individual activity and is the sort of thing that would result from monoplistic control (Tr. 15641-5; 15655; 17732-9);

That absence of competition is indicated in the following circumstances: (a) where base prices put in effect by one mill and recognized and followed by competitors are different on different sides of a State line; (c) where base prices of mills in adjoining areas differ by a constant figure from year to year, as a 10¢ differential assumed between Hudson Valley and Lehigh Valley mills; (c) and where bids on large quantities running into a million barrels evidence a high degree of identity in delivered prices quoted for a large number of destinations (Tr. 15645-55);

That conditions which permit of cross hauling, or "dumping," are wasteful, uneconomic, and indicative of collusion and trade restraint (Tr. 15638-9, 15795 et seq., 17762-70);

That the basing point system facilitates price leadership and permits of punitive action (Tr. 15657-67); that rigidity of prices over long periods of time, such as from Jan. 1, 1933, to June 1938, indicates the absence of price competi-

tion (Tr. 15655-7; 15753; 15824-5; 17694); that there are differences between the going price on grain markets, which is not predictable, and the one available price indicated in the cement advertisements in evidence (Com. Ex. 2837; Tr. 15321, et seq.); and that price rigidity of even a few months would be extraordinary in any industry where there are competitive conditions (Tr. 17695).

227. Respondents' economists develop a concept of competition which involves a decided difference of definition (Tr. 44628). Their testimony in several important particulars is to the following effect:

That rivalry manifested by variation of services and facilities such as the rendition of engineering or sales assistance to customers is price competition (Tr. 4473-9); that perfect competition or pure competition is not possible in the cement industry, and that imperfect competition is the only kind where reactions of competitors are important (Tr. 44629-36);

That identical prices are the natural economic result in an industry where the commodity is standardized, is of seasonal and inelastic demand, is a bulky and heavy commodity so that transportation costs approximate 25% of the average delivered price, where productive capacity of most mills exceeds the demand, where capital investments are large, where there are about 150 mills scattered throughout the country, where buyers are numerous and are well informed as to market conditions and who demand such policies on the part of the manufacturers as will prevent one dealer from securing cement at a lower price than another (Tr. 44612-19; 44624; 44626; 44645-6);

That prices are naturally more stable where a large percentage of business is sold to contractors under a price guarantee, where upward price movements thus prevent the manufacturer from realizing extra returns for a considerable time, where price reductions are retroactive and involve the manufacturers in making refunds or giving credit for shipments made up to five days prior to the effective date of the advance, and that under these circumstances relatively rigid prices are not in themselves indicative of monopoly (Tr. 43044; 44702-7);

That the knowledge that a price reduction would involve price changes at many points and would be known and met at all points by competitors would tend to produce price rigidity (Tr. 43046-7; 43052-9);

That price advances under the basing point conditions would be discouraged because it would make the seller's immediate territory more attractive to distant sellers and permit of greater freight absorptions, and that this knowledge on the part of sellers contributes to price rigidity (Tr. 43048);

That the cement manufacturers' ability to adjust supply to demand makes for price rigidity as against the different condition in the wheat market (Tr. 43049-50);

That inelasticity of demand operates to prevent price reductions from increasing volume and thus proving profitable and that such effects constitute a further discouraging factor to price reductions (Tr. 43058-61), and when cement constitutes a relatively small part of the cost of an operation or when its use is limited as to quantity, it is inelastic and does not respond with increased volume to price reductions (Tr. 43063-4; 44693, et seq.);

That inelastic demand encourages freight absorbing sales in the effort to reduce unit costs in the presence of large overhead costs and in an effort to maintain production to meet seasonal demand and for this reason cross-hauling is economically justifiable (Tr. 43069, et seq.);

That the competitive tendency is for seller services to buyers to become identical (Tr. 43093), and that conformity to similar or identical methods as to trucking diversions, and other features of selling dealers and contractors by various competing sellers operating under similar circumstances and conditions is consistent with individual action in each seller's self-interest (Tr. 43096, et seq.; 43100-3; 44653; 44687-8);

That meeting a competitor's price where found is competition (Tr. 44650);

That price is the total amount paid by the buyer on delivery and includes freight (Tr. 44656);

That the more vigorous and active competition is, the greater is the likelihood of a resulting uniformity of prices and trade practices (Tr. 44709);

That the adoption of a uniform mill net or f.o.b. mill system of pricing by all manufacturers in a given area would decrease competition and produce local monopolies which would result in higher prices to the United States and other consumers, and that such a system would reduce seller services, increase total mill capacity in the country, and be contrary to the public interest in that it would cause some mills to become bankrupts and would bring about

mergers and absorption by large companies (Tr. 43142-7; 44307, et seq.; 45187-92; 45605-17; 46049-52) and that one mill could not adopt a uniform f.o.b. mill system unless others in the area did the same (Id.).

Competition.

228. It appears throughout the record that there was keen sales rivalry among the various respondents named in this proceeding, and it is very clear that this rivalry did not ordinarily manifest in the form of price differentials (Pars. 93 (a), 165, supra). It is abundantly shown that for the most part prices were "met" or matched by competitors and that respondents did not desire to undersell each other (Par. 92 and citations). Also the evidence shows that differences in all features of service of sufficient importance to constitute substantial inducements to purchasers had to be and were met, or matched, for the same considerations as those which controlled the price quotations (Pars. 93 (b), 148, and citations).

From this evidence and that which relates to activities and policies tending to reduce differences in terms and conditions, it appears that the rivalry among these respondents did not usually manifest in the form of essential difference in terms or discounts (Pars. 148-50), in trucking policy (Pars. 120-2), in sack allowances (Par. 150) in opportunity to divert shipments (Pars. 123-9), in savings on quantity purchases (Pars. 150), or in differences in quality (Pars. 207-211). Some differences were shown as between Hercules and its competitors in the matter of engineering advice and assistance to customers (Tr. 26044-54). Respondents rendered sales assistance to their various customers which differed as between them in kind and degree (Tr. 26048-9; 26051). A dealer in Louisville, Ky., said he was influenced in cement purchases by sales assistance but that some of his purchases were "on a friendly basis" (Tr. 36711-13). So far as the record shows, the rivalry for many large government orders was not manifested in any way unless it existed intangibly in the form of a patient hopefulness on the part of each bidder that the little pea would stop opposite his or its name in the final drawing (Tr. 1698-9; 10313) or that the Ickes plan of awarding to the farthest mill in case of identical bids would not be applied (Tr. 188; 199).

229. The word "competition" is used with various dissimilar meanings in the record, and respondents contend that the "matching prices" or "meeting competition," as heretofore shown, is real competition and is effected and maintained by methods gradually evolved throughout many years, which methods do not require or involve any agreement, mutual understanding, or cooperative action between competitors. It is also contended that trade rivalry which manifests in differences of service is also price competition. The complainant contends that the system, methods, and trade conditions shown are such as could not be brought about by individual action or in the absence of some form of agreement, collusion, or conspiracy, and that the direct evidence also shows that they were not so brought about and employed. This raises the ultimate issue for the Commission and the courts, and the same is hereby and herewith

Respectfully submitted,

/s/ John W. Norwood,

Trial Examiner.

Note: "The trial examiner's report is not a report or finding of the Commission. Such report is advisory only and is not binding upon the Commission."

This at Washington, D. C., the 24th day of May, 1941.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION.

(Caption—3167)

EXCEPTIONS TO TRIAL EXAMINER'S REPORT BY COUNSEL FOR THE COMMISSION.

(Dated June 20, 1941.)

Now come counsel for the Federal Trade Commission and take exception to the Trial Examiner's report on the evidence as hereinafter stated. In submitting these exceptions counsel for the Commission commend the exceptional accurracy and clarity with which the Trial Examiner has set forth such facts as he has found. Comparatively few and relatively unimportant errors can be located. Most of the exceptions taken and the most important ones go to the Examiner's failure or omission to make certain findings needful for a more complete under-

standing of the facts. The exceptions to particular paragraphs of the report are presented seriatim, after which such general exceptions as are deemed necessary will follow. In some cases no citations are necessary other than those given by the Examiner.

Exception No. 1. Exception is taken to the failure to report in Paragraph 4 (p. 8) that the Trustee of respondent Institute gave instructions to the Code Authority (Com. Ex. 621F, Vol. 11; see also Tr. pp. 24, 427-24, 428; Com. Ex. 608F and 617B, Vol. 11; Tr. pp. 16,904, 16,905, 16,975, 16,978; Com. Ex. 619A and 631A, Vol. 14).

Exception No. 2. Exception is taken to the failure to report in Paragraph 54 (p. 21) that the date of resignation is not the effective date of separation from the Institute in that the articles of association require one year's notice of intention to resign and the continued payment of dues during that period (Com. Ex. 1381, Vol. 2; Com. Ex. 651, p. 10, Vol. 10).

Exception No. 3. Exception is taken to the failure to report in Paragraph 66 (p. 24) that respondent Spokane is operating under the same control and management as the predecessor corporation of the same name (Tr. p. 47,657).

Exception No. 4. Exception is taken to the failure to report in Paragraph 73 (p. 26) that respondent Universal-Atlas is and has continuously been a subsidiary of the United States Steel Corporation (Tr. p. 450 et seq.).

Exception No. 5. Exception is taken to the failure to report in Paragraph 86 (p. 30) that during the years of greatest depression the percentage of cement sold by dealers declined to less than half of the total while the percentage represented by purchase of public agencies correspondingly increased to more than half. (Tr. p. 17,291, Mallory).

Exception No. 6. Exception is taken to the erroneous conclusion or suggestion in Paragraph 87 (p. 30) that the demand for cement is inelastic. The evidence in the record is to the effect that Portland cement constitutes a substantial part of all building materials used in much of the heavy construction in this country (Resp. Ex. 3661-3669; Vol. 94; Tr. pp. 47,544-47,564, Com. Ex. 3304 A-B, Vol. 67). It is also clear that sharp and great variations have occurred in the volume of cement shipped and consumed (Resp. Ex. 3508, Vol. 93; Com. Ex. 3288, 3291, 3300,

3304, Vol. 67), and that such variations proportionately reflect variations in volume of heavy construction during the same period of time (Resp. Ex. 3508, Vol. 93; Com. Ex. 3288A-B, 3291, 3300, 3301, 3304A-B, Vol. 67). Considering those circumstances in the light of the showing in the record that during that same period of time, namely, 1932, 1933, and the immediately succeeding years, the respondents were sharply advancing their base prices and thereby causing the delivered cost of cement to the consumers to be increased (Com. Exs. 2268-2358, Vol. 38; Com. Exs. 3311-3349, Vol. 67; Com. Exs. 3300 and 3301, Vol. 67); and Resp. Exs. 2500-2508, Vol. 85); then we have before us all of the elements required by theorists to describe a condition of elasticity of demand (see testimony of respondents' expert economist, Tr. pp. 44,450-44,453) as well as all of the elements required for a practical and common sense description of elasticity of demand.

Exception No. 7. Exception is taken to any statement in Paragraph 88 (p. 31) insofar as it permits an inference that the only method of ascertaining which mills are basing point mills is by subtracting freight to obtain a constant mill net. The identity of base mills is well known, does not change over long periods of time, and some of the leading base mills publish the base prices (Com. Ex. 1213A-B, Vol. 31; Com. Ex. 1185, Vol. 29; Com. Ex. 1111, 1114, 1118, Vol. 28; Com. Ex. 1332, 1333, 1370-1380, Vol. 34; Com. Ex. 1952, Vol. 37; Com. Ex. 2366, Vol. 38; Resp. Ex. 2487, Vol. 85; Resp. Ex. 2610, Vol. 86; and Resp. Ex. 457, Vol. 72).

Exception No. 8. Exception is taken to any statement in Paragraph 89, p. 31) insofar as it would permit an inference to the effect that changes in basing point prices as made by one mill may be discovered by other mills only through analysis of the announced prices of the mill making the change and the application of the basing point factors. Exception is also taken to the failure to point out that respondents have, in meetings and in communications which passed between them, discussed the use of particular basing points prices (Com. Ex. 2237-2247, Vol. 38; Com. Ex. 3858, 3209-10, Vol. 67; Tr. pp. 11,034-5, 11,380, 14,690, 11,480); and entered into agreements to use particular basing point prices for particular territories (Com. Exs. 3235-W, 3235-Z36, 3235-Z54, Vol. 67; 3196-RR to ZZ, Vol. 65; 3235-Z59, Vol. 67; 3209 A-C and

3211, Vol. 65). Exception is further taken to the failure to state in this immediate connection that frequently basing point price changes are made by price leaders, "policemen" of the basing point system, in the industry as a punitive measure against some one of the manufacturers who had failed to adhere 100% to the basing point system, as is shown by the evidence presented in paragraph 104, page 38, of the Examiner's report.

Exception No. 9. Exception is taken to the failure to report in Paragraph 90 (p. 31) that in recurrent but exceptional instances basing point mills receive a higher mill net than their base price due to using cheaper forms of transportation than the rail base on which their delivered price quotations are calculated or to calculating rail freight for pricing purposes at higher amounts than the actual freight for shipping purposes. Exception is also taken to the finding that a base mill "merely meets the prevailing price at a given point when going outside its own base territory and to the failure to find that in so doing it uses some other base mill's base price plus freight. (Com. Ex. 973-1E, 973-2B, 973-2C, Vol. 21; 972-3L, 972-3A, Vol. 26; 973-20, Vol. 21; 972-3C, Vol. 20; 973-2K, Vol. 21; 1112, Vol. 28.)

Exception No. 10. Exception is taken to the failure to report in Paragraph 91 (pp. 31, 32) that base mills as well as non-base mills are enabled to absorb freight by obtaining higher prices from their nearby customers and that the uniform destination price of all mills is the reflection of such differences (Com. Ex. 1100A-B, 1101A-B, 1102A-B, Vol. 28).

Exception No. 11. Exception is taken to the failure to report in Paragraph 93 (p. 33) that the prevailing trade conditions therein set forth are the result of agreements, understandings, cooperation, and concert of action, some of which are described in Paragraphs 166 to 183, inclusive (Com. Ex. 3192, 3193, Vol. 65; 3235B, 3235X-Z114, Vol. 67; and Com. Ex. 561, Vol. 10).

Exception No. 12. Exception is taken to the report in Paragraph 93-(1), p. 24, that the delivered price was thought to be too high by Mr. Crapo, as his testimony was to the effect that the Milwaukee base price was too high, because of the 53-cent freight absorption. Exception is also taken to the failure to report that freight absorptions of more than that amount are common in the industry (Tr.

p. 11,116, Com. Ex. 972-2L, Vol. 20; 973-2L, Vol. 21; 972-1R, 972-2R, 972-1W, Vol. 20).

Exception No. 13. Exception is taken to any statement in Paragraph 106 (p. 39) insofar as it would permit an inference that there is any competent evidence that Aetna had induced any breach of contract between Wabash and the Indiana purchasers.

Exception No. 14. Exception is taken to the incorrect report that the Dewey plant was at Ada, Oklahoma, its location being at Dewey, Oklahoma (Com. Ex. 1, Vol. 1).

Exception No. 15. Exception is taken to the report that Alpha placed the base at Cape Girardeau on February 3, 1931, the correct date being December 1930 (Com. Ex. 971-31A, Vol. 19).

Exception No. 16. Exception is taken to the failure to report in Paragraph 112 (p. 40) that the quoted statement was in response to a suggestion that departures from formula prices should be investigated and punitive bases imposed by joint action of the offender's competitors, that Mr. Young agreed in principle with the idea and objected only because of legal considerations (Com. Ex. 817G-I, Vol. 12).

Exception No. 17. Exception is taken to the failure to report in Paragraph 113 (p. 41) that Lehigh also imposed the base on the Conshohocken mill and withdrew it upon the discontinuance of trucking; also to the failure to report that Districts 5, 7 and 8 of respondent Institute condemned the use of punitive bases, (Com. Ex. 828-7G, Vol. 12) that punitive bases were withdrawn in 1932 coincident with the advancing of base prices. (Resp. Ex. 2505 and 2506A-B, Vol. 85 and Com. Ex. 2912A, Vol. 38) and that since then respondents are afraid to deviate from the formula price (Tr. pp. 412, 11,124, 1908, 26,857-26,860).

Exception No. 18. Exception is taken to the failure to report in Paragraphs 113-116 inclusive that the so-called freight rate service includes some mill locations which are not basing points in order to camouflage the relation of the service to the basing point system, that some mill locations are not included as head line points, and that some head line points are not mill locations from which any domestic shipments move (Com. Ex. 994, Vol. 25; 1110-Y 1110-O, 1110-C, 1110-D, Vol. 28).

Exception No. 19. Exception is taken to the failure to report in Paragraph 118 (p. 43) the existence of other

evidence of agreements to use the so-called freight rate service for pricing purposes (Com. Ex. 2830, Vol. 53).

Exception No. 20. Exception is taken to the failure to report in Paragraphs 120-121 (pp. 44, 45) that respondents discussed among themselves and agreed upon the policies which they employed in refusing to load trucks at their mills with cement sold on an f. o. b. mill basis without penalty. There is an abundance of such evidence (Tr. pp. 583, 601-3, 657-9, 4590-4600, 4604, 4608-9, Com. Exs. 1043 A-4V, Vol. 27; Tr. pp. 4620, 37,998-37,999, 41,154 et seq., 41,625-41,628 and Com. Ex. 1043-AA, Vol. 27 and 1043-4S-4U, Vol. 27).

Exception No. 21. Exception is taken to the failure to report in Paragraphs 123-129 inclusive (pp. 46-48) that respondents induced and initiated the action of the railroads in aiding respondents by preventing diversions through use of the no-diversion stamp on bills of lading (Com. Ex. 751D, Vol. 11; see also Com. Ex. 749VV, Vol. 11).

Exception No. 22. Exception is taken to the failure to report in Paragraphs 130-131 inclusive (p. 48) that respondents entered into agreements and understandings to refrain from quoting genuine f. o. b. mill prices to the Government and other purchasers (Com. Ex. 7 A-B, Vol. 1; Com. Ex. 571 RS, Vol. 10; Tr. pp. 132-232, 2204-2210, Com. Ex. 559A-B, Vol. 10, Tr. p. 3056).

Exception No. 23. Exception is taken to the failure to report in Paragraphs 132-133 (p. 49) that the so-called control clause was imposed and promoted by mandate of the Code Authority and that the Code Authority advised respondents to refuse to allow the government to deduct commercial freight from the destination cost (Com. Ex. 753B, Vol. 11; Com. Ex. 159-53, Vol. 2; Com. Ex. 716B, Vol. 11; Com. Ex. 277K, Vol. 5). Also exception is taken to the report that the control clause operated to secure the benefit of land grant rates to the government, that it "enabled the Government to make a saving approximating the land grant advantage" and that there was no showing that the purpose was to deprive the government of freight advantages (Tr. pp. 154, 166, 259, 1452, 1457, 1731; Com. Ex. 158A-E, Vol. 2; Tr. pp. 3398, 3400-3406; Com. Ex. 277Z-277AA, Vol. 5; Tr. pp. 1828-1829, 1880-1881, 1884-1886, 2186, 2189; Com. Ex. 333, 334, 335, 336, 337, 338, 339, Vol. 6). It is submitted that respondents

must be taken to have intended the natural and necessary consequences of their acts, that they well knew the control clause would operate in some cases to deprive the government of the full benefit of land grant rates and that it necessarily so operated under certain frequently arising conditions. Further exception is taken to the failure to report that the amount of deprivation in various specific instances ran to 30 cents a barrel or more.

Exception No. 24. Exception is taken to the failure to report in Paragraph 136 (p. 50) that respondents refused the President's request, that such refusal on the stated ground that quoting f. o. b. mill would promote monopoly with characterized by a trustee of the Institute as "sheer bunk and hypocrisy" and that the truth was that the industry "must systematically restrain competition or be ruined" (Com. Ex. 6A-B, 7A-B-C, Vol. 1; Tr. pp. 90, 2012; Com. Ex. 347C, Vol. 7).

Exception No. 25. Exception is taken to the report that the government was deprived of freight savings on all its purchases for emergency unemployment relief. It was deprived of freight savings only where land grant rates were involved but it was deprived of benefit equivalent to the dealers' margin of direct purchasing for all such purposes (Com. Ex. 2401, Vol. 38; Com. Ex. 329-339, Vol. 6; Com. Ex. 1046-1063, Vol. 27; Com. Ex. 2135-2148, Vol. 37; Com. Ex. 2612-2617, Vol. 40; Com. Ex. 813V, 813EE, 874-DD, Vol. 12; Com. Ex. 1979, 3rd para., Vol. 37; Com. Ex. 2611-2617, Vol. 40; Tr. pp. 14130, 14133-14134, 14155, 14159, 14166, 14175, 14179-14182).

Exception No. 26. Exception is taken to the failure to report in Paragraph 141 (p. 54) that the Sixth District of the Institute voted unanimously to adopt the "Method of Marketing Cement' before it was sent out (Com. Ex. 547-3W-4J, Vol. 9).

Exception No. 27. Exception is taken to the failure to report that the policy described in Paragraph 147 (p. 57) embodied an agreement between respondents and dealers' associations (Com. Ex. 3193 pp. 11-12, Vol. 65; Com. Ex. 556, Supp. p. 13, Art. III (1) Vol. 10; Com. Ex. 1022-00. Vol. 26).

Exception No. 28. Exception is taken to the failure to report in Paragraph 148 (p. 57) that there is evidence in the record to the effect that the uniform terms and conditions of sale as used by the respondents have resulted

from understandings and agreements among respondents to make them uniform (Com. Exs. 3235-R, 3235-X to 3235-Z114, Vol. 67; Com. Ex. 3192, Vol. 65, pp. 1-20; Com. Ex. 3193, Vol. 65, pp. 1-17; and Com. Ex. 561, Vol. 10).

Exception No. 29. Exception is taken to the failure to report in Paragraph 152 (p. 58) that exactly coincident with the initial action there described prices in the territory affected were advanced 29 cents a barrel or more (Com. Ex. 3329, Vol. 67; see also Resp. Ex. 2403-H, Vol. 85).

Exception No. 30. Exception is taken to the failure to report in Paragraph 162 (pp. 61, 62) that economic specialists in agricultural marketing testified that such advertising was inaccurate and misleading (Tr. pp. 15288-89, 15291, 15462).

Exception No. 31. Exception is taken to the report in Paragraph 163 (p. 62) that the El Paso mill had a base price for Arizona different from that used by it for other territory. Exception is also taken to the failure to report that the differential of 10 cents between the Lehigh Valley and Hudson Valley base prices has existed for many years and that within the localized area where freight rates were not the same, a single point such as Northampton, Pa., was the recognized basing point (Com. Ex. 1185C, Vol. 29; Com. Ex. 1213B, Vol. 30; Tr. pp. 6033, et seq.; Tr. p. 24,570; Com. Ex. 971-75, Vol. 19).

Exception No. 32. Exception is taken to the report in Paragraph 165 (p. 63), that "price cutting" or selling below one's announced price has been engaged in occasionally during all periods. The evidence is to the effect that members of the industry generally did not sell below their openly announced prices compiled through the use of the formula of basing point price plus railroad freight to destination, from the depth of the depression in the latter part of 1932 or first part of 1933, until the date of the issuance of complaint in this case and, in fact, some of the members of the industry did not so indulge even during the period of the partial breakdown of the respondents' price structure during 1931 and the first half of 1932 (Tr. pp. 34,654, 34,657-34,659, 34,683-34,684).

Exception No. 33. Exception is taken to the statement in Paragraph 166 (p. 64) that inferences "may or may not be drawn" from the preceding parts of the report as to collusion, etc. The preceding parts of the report contain

many statements and descriptions of evidence from which there is a necessary inference of collusion (Pars. 166-196; Pars. 114-122, 129, 130-138, 139-146, 151-154, 161-162, 202-204).

Exception No. 34. Exception is taken to any statement in Paragraph 173 (p. 66) insofar as it would permit an inference that the request of the New Jersey Highway Commission was for an irrational specification.

Exception No. 35. Exception is taken to the report in Paragraph 175 (p. 67) that the base price was $1.25 without showing that this was in cloth bags and the stripped price equivalent was 85 cents (Com. Ex. 3225, Vol. 67; Tr. pp. 33,234-33,236; Com. Ex. 1121-F, Vol. 28).

Exception No. 36. Exception is taken to the failure to report in Paragraph 177 (p. 68) that on July 16 Marquette led the advance of 40 cents and on the same day confirmed finally its re-entry into the Portland Cement Association (Com. Ex. 2268-2358, Vol. 38).

Exception No. 37. Exception is taken to the failure to report in Paragraph 178 (p. 68) that the agreement referred to involved the extension of the basing point system into Montana and eastern Washington (Com. Ex. 3209A-C, 3210A-C, Vol. 65).

Exception No. 38. Exception is taken to the failure to report in Paragraph 180 (p. 69) that the practice of quoting generally on a delivered basis did not begin until the leasing of the Pacific Coast Company's plant, after which all the mills became basing points and the basing point system was established (Tr. p. 8389).

Exception No. 39. Exception is taken to the failure to report in Paragraph 181 (p. 69) that arbitrary zone price lists were exchanged among other respondents than those named and in Paragraphs 182 that the exchange of price lists took place before the Code as well as during and after it (Com. Ex. 551J-551-3N, Vol. 10).

Exception No. 40. Exception is taken to the acceptance in Paragraph 183 (p. 70) of the incompetent, speculative conclusion of an official of one of the respondents to the effect that he "would follow a lower price than" one of his competitor's regularly published prices if his company should find such lower price at any given point. Consideration should be given only to the competent factual showing in the record of what that respondent actually did in taking "the other fellow's price in all

cases" (Tr. pp. 8937-8939) and that the prices of all of the respondents thus quoted on a delivered price basis were identical (Tr. pp. 8532 and 8618).

Exception No. 41. Exception is taken to the failure to report in Paragraph 183 (p. 70) that agreements and understandings to eliminate and restrict trucking were entered into at these meetings and conferences (Com. Ex. 1043AA, 1043AAA, 1043B, 1043-48-4U, Vol. 27; Com. Ex. 2269, Vol. 38; Com. Ex. 1494-1765, Vol. 34).

Exception No. 42. Exception is taken to the inference in Paragraph 190 (p. 72) that the Department of Justice and the Federal Trade Commission were kept informed of all steps taken by the respondents in connection with their negotiations with the T. V. A. The facts are that the respondents did so agree upon that price (Com. Ex. 1493, Vol. 34) and at the time raised the question whether their agreement was such as would lay them open to charges of violation of the Antitrust Law and therefore whether officials of the Department of Justice should at that time be advised of the matter (Com. Ex. 1493, Vol. 34). There is no evidence that they were informed of the respondents' agreement to quote to the T. V. A. a price of $1.30 per barrel as a base price on the second nearest mill from the point of delivery of cement to the T. V. A. In fact, Dr. Arthur E. Morgan failed to recall of any steps having been taken to inform the Department of Justice and the Federal Trade Commission of the mentioned agreement of the respondents to fix the price quoted to the T. V. A. There is, moreover, positive evidence in the record to the effect that the respondents did not desire to give any publicity concerning the agreement among themselves or the details of their negotiations with T. V. A. official (Com. Ex. 359-360, Vol. 7). They were not only satisfied but expressed their desire to inform the public only of the fact that T. V. A. had decided to buy cement instead of manufacturing it (Com. Ex. 359-360, Vol. 7).

Exception No. 43. Exception is taken to any statement in Paragraph 198 (p. 74) insofar as it would permit an inference that the Clark-Burns survey was discontinued about June 1937, the facts being that the report based upon the survey was almost ready for publication at that time. Exception is also taken to the report in Paragraph 199 that the Clark-Burns report was subpoenaed (Com. Ex. 913-2A, Vol. 13; 958-5M, Vol. 14; see also Com. Ex. 958-5L, Vol. 14).

Exception No. 44. Exception is taken to the failure to report that the Code did not authorize the relaying of filed prices to each other by respondents until it was amended as proposed by respondents about two weeks before the NIRA was held unconstitutional (Com. Ex. 557, Vol. 10).

Exception No. 45. Exception is taken to the failure to report in Paragraph 203 (p. 76) that the purpose of such contracts was to facilitate price increases, that they were imposed on dealers or contractors by concerted action of respondents and that the so-called deceptions were attempts to escape the effect of such concerted restrictive impositions. The real motive for the respondents' indulgence in contract checking activities was exposed when officials of respondents were called as witnesses in their own behalf and admitted on cross-examination that the purpose of those activities was to keep cheap cement off the market (note MacDonald testimony Tr. pp. 36, 499-36, 500; 48,180 and Com. Ex. 137J, Vol. 2) and in their written reports as to what they were accomplishing through their contract checking long before the issuance of the complaint in this case (see McClain's reports on contract checking in the Midest, Com. Ex. 141-65, Vol. 2 and Com. Ex. 556, p. 25, Vol. 10).

Exception No. 46. Exception is taken to any statement in Paragraph 210 (p. 79) insofar as it permits an inference that the improvement in quality since 1904 has resulted from the standardizing methods of respondents. There is evidence that respondents have resisted improvements in quality and that the improvement has been largely the result of pressure from consumers groups (Com. Ex. 553, Vol. 10).

Exception No. 47. Exception is taken to any implication in Paragraph 211 (p. 79) that action taken at the meeting referred to finally disposed of the Incor matter.

Exception No. 48. Exception is taken to the failure to report in Paragraph 216 that there was a definite agreement to reduce output to 70% of the capacity as rated by Mr. Mallory, and that such percentage of reduction was attained in several districts and exceeded in several other districts. Exception is also taken to the statement that respondents rejected by vote in 1934 all propositions relating to allocation and division of business. The facts are that in some districts plans for allocation of business

among respondents continued to be actively discussed after the mentioned vote of rejection on March 14, 1934 (Com. Ex. 818-4B-4C, Vol. 12; 812-1D, Vol. 12; 821-N, Vol. 12; 821-M, Vol. 12; 636-C, Vol. 11; 598E-F, Vol. 11; 621-E, Vol. 11; 637-L, Vol. 11; 577-2P, Vol. 10; 577-2 Q, Vol. 10; 577-RR, Vol. 10; 2888-2889, Vol. 53). Shipments were allocated in one district (Com. Ex. 2621-2623, Vol. 40). Exception is further taken to the failure to report that a policy of keeping production in line with shipments was advocated by Mr. Mallory, that he urged the fallacy of reducing costs by full time operations, that production was kept in line with shipments, that there has been an attempt to apportion available business on the principle of quota shares, at times based on capacity and at times based on shipments, and that in some districts there has resulted a static condition in the proportions of total business done by the respective respondents (Com. Ex. 821E, Vol. 12; Com. Ex. 2662A-B, Vol. 41; Com. Ex. 426P, Vol. 9; Com. Ex. 844D, Vol. 12; Com. Ex. 821-2J, Vol. 12).

Exception No. 49. Exception is taken to the failure to report in Paragraph 224, top of page 85, or make reference to evidence in the record to the effect that variations as between customers at different points not only exist in mill nets but also in delivered price quotations (Com. Exs. 9, 10, 11, 12, Vol. 1; Com. Ex. 2450, Vol. 39; Com. Ex. 2707-2802, Vols. 45-53); that the record is void of any showing of justification on the basis of differences in cost of manufacture or methods of sale and delivery such as to bring about such variations in delivered price quotations, and that the variations in mill net are accounted for by nothing except the fact that thereby delivered prices become identical at any given destination.

Exception No. 50. Exception is taken to the failure to report in Paragraph 227 (p. 86) that on cross examination respondents' economists admitted that freight absorption is the equivalent of dumping in foreign trade (Tr. pp. 43,199; 43,458-59), that is involves discrimination against the home market buyer (Tr. p. 43,614) and that the amount of the discrimination is measurable only in terms of mill net (Tr. p. 43,699). Exception is also taken to the failure to report that in the ordinary conduct of business respondents treat mill net as the equivalent of price and have used it interchangeably with the word price (Com. Ex. 1321 (P. 18), Vol. 34; Tr. pp. 43,071, 43,874). Exception is further

taken to the failure to report that respondents' economists assumed the existence of a competitive market as a prelude to applying the economic theory of a uniform price in a market (Tr. p. 44,658) and admitted that identical prices are equally consistent with absence of competition (Tr. pp. 43,037, 43,394-5). Exception is further taken to the failure to report that under accepted economic theory bid and asked prices or price quotations are not expected to be uniform in any state of free competition (Tr. p. 48,146); that the economic rule concerning approximate uniformity of price in a free market applies only to "exchange" or "paid" prices and not to bid and asked prices or price quotations (Tr. p. 48,133, et seq.). Exception is further taken to the failure to report that on cross examination respondents' economists asserted that price competition still exists even though an agreement among competitors may have eliminated differences in price, and only variation in services and facilities remains (Tr. p. 43,367). Exception is further taken to the statement that expert economists called by the respondents testified that when cement constitutes a relatively small part of the cost of an operation or when its use is limited as to quantity demand is inelastic and does not respond with increased volume to price reduction, without presenting in connection therewith, or there making reference to, evidence in the record to the effect that cement constitutes not a small but a substantially large part of the cost of all materials used in heavy construction industries in the country (Resp. Ex. 3669, Vol. 94; Tr. pp. 47,544-47, 564, and Com. Ex. 3304A-B, Vol. 67).

Exception No. 51. Exception is taken to the report in Paragraph 227 (p. 87) as to what expert economists called as witnesses by respondents testified concerning the effects and results to be expected if respondents should adopt a uniform f. o. b. mill method of pricing. Since there is no law requiring strict uniformity in price whether f. o. b. mill or otherwise, it is submitted that such testimony should not only have been excluded from the report but should also have been excluded from the record at the time it was objected to by counsel for the Commission as incompetent and highly speculative and also irrevelant and immaterial in that it meets no issue presented either by the complaint or by the evidence presented by counsel for the Commission. The complaint does not propose any substi-

tute method of quoting to be used by the respondents; it merely challenges the multiple basing point pricing system as used by them. Hence a discussion of the possiblities of respondents using particular substitutes for the multiple basing point pricing system challenged here has no place in either the examiner's report or in the record.

Exception No. 52. Exception is taken to the failure to report that in the case of bids on Bonneville Dam there were definite agreements and understandings as to the identical price to be bid by respondents and that in the case of Owyhee-Minidoka projects there were definite agreements and understanding that pre-arranged non-identical bids would be filed (Com. Ex. 159, 163, Vol. 2, and Com. Ex. 1196, 1197, Vol. 29).

Exception No. 53. Exception is taken generally to the failure to report that the major part of the documentary evidence and a very large part of the oral testimony presented in support of the complaint consisted of the records, writings and testimony of respondents themselves. Exception is also taken to the failure to report as to the demeanor and conduct of witnesses for respondents; the methods of preparing their testimony, and their responsiveness and evasiveness on the witness stand.

Exception No. 54. Exception is taken generally to any failure to report in accordance with contentions of counsel for the Commission as submitted to the Examiner on January 18, 1941, or in accordance with the record evidence cited therein in support of such contentions.

Respectfully submitted,

By Counsel for the Federal Trade Commission.

Walter B. Wooden.
Everette MacIntyre.
Lynn C. Paulson.

June 20, 1941.

UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—3167)

EXCEPTIONS OF RESPONDENT HURON PORTLAND CEMENT COMPANY TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Received Nov. 10, 1941.)

Huron adopts all and every exception taken by counsel for the Institute and by counsel for other respondents in respect to any and all items in said Report other than to those to which Huron hereinafter specifically excepts.

Huron further specifically excepts to said Report as follows:

1. (6)—Huron adopts such exception as may be taken by counsel for the Institute to the report under the title "Answers" on page 6 thereof. It also excepts to said statement as being incomplete. The report should state as follows:

"The answer of the Huron Portland Cement Company was filed on or about September 16, 1937. The following is a synopsis of it. (The Roman numerals indicate the paragraphs of the Complaint.)

Count I.

I. Huron admits the allegations of Paragraph I and sets forth the location of its nine auxiliary plants; showing that its cement was manufactured at Alpena and transported in bulk to its auxiliary plants from which it was sold.

II. Admitted.

III. Admitted.

IV. Denied.

V. (a) Denied.

(b) Denied. Huron denies that as to all destinations to which it ships cement it fixes a price by the method set forth in the complaint, showing that as to all destinations in the Lower Peninsula, except those in the County of Wayne, it makes the same destination price on all deliveries. That price is fixed without reference to any basing

points. The same destination price is made to all destinations in the counties of Wayne, Macomb and Oakland, and that price also is fixed without reference to any basing point. Destination prices established outside of Michigan were determined by factors of cost and competition.

(c) Denied. Huron sets forth in detail the method by which it arrives at prices.

VI. Huron shows that it has no knowledge of identical bids referred to in Paragraph VI except as to bids on cement to the United States for use at Fort Peck, Montana. It admits that at one time it submitted a bid of $2.7054 per barrel on this invitation. Thereafter, it refrained from bidding because of its impossibility of making the required delivery. It shows that it sold the Government 600,000 barrels of cement for Fort Peck at a price substantially less than the bid of $2.7054 per barrel.

VII. Denied generally.

(a) Admits receiving rate books, but denies using same, except to check own records. Huron makes up its own rate sheets, using lawful rates contained in the railroad tariffs.

Denies the use of rate information for the purpose charged in the complaint and denies that it has an understanding with other producers as to the use of the rate book or of the railroad rates. It asserts that it uses the correct railroad rate.

Denies any understanding with the Institute or with any other producer and denies any understanding that the Institute's freight rate schedules, right or wrong, are to be used. Shows that Huron's practice was entirely to the contrary.

(b) Shows that Huron has accorded the privilege of buying at the point of reduction; denies that it has resorted to various means to prevent the use of trucks. Shows, on the contrary, that it makes delivery by truck of a substantial portion of its cement; shows that it offers the option to purchasers to take delivery by truck or by rail; denies that is charges 15c a barrel for truck delivery; denies that it ever attempted to prevent the loading of cement on trucks furnished by customers; and denies that its practice with respect to truck deliveries has eliminated any source of competition in destination prices.

(c) Denies that the tendency of its provision as to diversion in transit is to maintain destination prices, or that that was its purpose in using it.

(d) Huron denies that it thwarted the effort of the Government to secure f.o.b. prices. It shows that it has knowledge of land-grant rates; that it has used them on Government bids; that it has made a plant price when requested by the Government; that the Government had full benefit from it of land grant rate. It admits that it used a clause which provides a method by which the Government can determine the contract price f.o.b. plant, but is not advised whether this is the control clause referred to in the complaint. It denies that by the use of this clause it deprived the United States of the benefit of land grant rates or of price competition.

(e) Huron shows that under the NRA Cement Code, there was a provision that would require the division of customers into two classes; that this article of the Code was later suspended and not reinstated. Denies that if has arbitrarily or co-operatively made a classification or division of its customers.

(f) Denied.

(g) Denies that its terms of sale and discount are uniform with those of all others and denies that they are the result of a mutual understanding.

VIII. Huron has no knowledge of the matters set forth in this paragraph, and denies that it at any time participated in any acts there described.

(a), (b), (c) and (d) are specifically denied.

(e) Huron neither categorically affirms nor denies.

(f), (g) and (h) are denied.

(i) Huron has no knowledge of matters therein stated.

(j) Denied in part. Huron admits identical prices have been charged for cement on public works. The remainder of paragraph is denied.

IX, X and XI. Denied.

Count II.

XI. Denied. Huron asserts that the actual price is the price paid by the purchaser on the delivery of the cement. The net return is the actual price less the cost of transportation and delivery.

Huron denies the discrimination as charged.

VII. Huron denies that the tabulation included in Paragraph XII is a fair illustration of the practices of the re-

spondent Huron. It denies that the tabulation is material and asserts it is not an accurate statement of prices and rates presently in effect.

VIII. Denied, except that Huron admits that a difference of 1c a barrel may deflect business away from one manufacturer to another.

IX. Denied.

2. (34)—Huron excepts to the second paragraph of item 34. There should be added to it the following:

"*As to pricing*, see (Tr. [Crapo] 11020-30; Tr. [Myers] 33309, 33316 et seq., 33325-7, 33346-58, 33365-6, 33377, 33283-494, 33499-500, 33504, 33564-6, 33593-601; Tr. [Rooney] 33664 et seq., 33677-8, 33680-1, 33689-92, 33700, 33709, 33714-5, 33719).

Huron submitted to the War Department a bid of $2.7054 on June 5, 1934, for the cement for the Fort Peck project. Bids identical in amount were submitted by nine other producers. Huron's proposal, however, varied from the others in offering metal containers for samples, which has an advantage to the Government. (Tr. 11089, et seq.). Huron submitted a bid of $2.5054 on July 25, 1935, for the cement for the Fort Peck project. Bids identical in amount were submitted by two other producers (C. E. 168-A). Huron submitted a bid of $1.84 per barrel for 1,200,000 barrels for the Tygart River Reservoir Dam on January 18, 1935. Sixteen other companies submitted the same figure. The bids of June 5, 1934, and January 18, 1935 were within the NRA period when, by the Cement Code, the respondents were required to file their proposed bids with the Code authority. Huron bid non-identical prices on other Government proposals. See WPA Procurement invitations. (Tr. 33317-9; 33671-2; 33688-9, 33696-9).; "Good Friday" invitation (Tr. 30543-6, 3504); Wisconsin Highway lettings (C. E. 1910). It sold 605,000 barrels in bulk for Fort Peck on June 30, 1926, at $1.4205096 with a cash discount of 10c per barrel (C. E. 329, 1740-3, 1827, R. E. 18 A-L, 1838 FF, Tr. 11092). This was on an emergency contract as to which there were no bids taken.

As to meetings, see Tr. 33702 et seq. 33711.

As to trucks, see Tr. (Myers) 33337, 33433, 33437-9, 33459, et seq., 33497, 33499-521."

3. (87)—Huron excepts to the third sentence of the first

paragraph of item 87 and proposes as a substitute therefor the following:

"The raw materials out of which cement is manufactured are found at various locations. In some localities, such as the Lehigh Valley, they exist in the form of cement rock; in others as at Alpena, Michigan, in the form of limestone of a certain variety and of shale. While these deposits of these materials are widely distributed, they do not, except in a certain few instances, coincide in situation with the larger markets of the finished product. The location of these materials is the necessary condition of the location of the cement plant. Whether or not the plant is there located and the materials are developed is determined by the availability of a satisfactory market, since cement being a heavy commodity, the cost of transportation is proportionately great and the distance of a plant from the market is of great importance to the success of the enterprise."

4. (92)—Huron adopts such exception as may be taken by counsel for the Institute as to item 92.

It particularly excepts to the statement in item 92 as follows: "The settled philosophy and policy in the trade as reviewed by many witnesses and documents hereinafter cited is," etc.

The Report should state that:

"Huron does not pursue policies identical with or similar to those of other producers: (See subdivision [f] of item 92 of the Report); in that it does make f.o.b. mill quotations to undisclosed destinations. (See subdivision [g]); in that it does reduce prices on large quantities sold to the United States Government. (See subdivision [h]); in that its sales policy is not predicated in any way on the theory that delivery to trucks on an f.o.b. mill basis disrupts competition; in that Huron has continually encouraged delivery to trucks and transportation by trucks; and in that a great portion (approximately three-quarters) of its cement is so delivered in trucks either owned or hired by Huron, Huron dispatching same and paying the cost and charges for the transportation of the cement to the customer, and in that it has likewise sold and does sell its cement on an f.o.b. mill basis."

5. (93)—Huron adopts such exception as may be taken by counsel for the Institute to item 93.

It particularly takes exception, however, to paragraph (b). The Report should state that Huron's practices as to delivery to trucks and as to f.o.b. mill quotations are not identical with the practices of other producers.

It particularly excepts to subdivision (e). The Report should state that savings can be made by purchasers from Huron through the use of trucks.

It particularly excepts to subdivision (g). The Report should state that advantage in price can be obtained from Huron by reason of the customers' proximity to its mills.

It particularly excepts to subdivision (h). The Report should state that cement can be bought of Huron by ordinary customers.

It particularly excepts to subdivision (i). The Report should state that Huron's prices have not remained stationary for long periods of time.

It particularly excepts to subdivision (n). The Report should state that while prices generally were figured on rail freight charges, Huron has sold substantial quantities of cement f.o.b. mill and delivery thereof was made by transportation facilities, such as by trucks, which are cheaper than rail on the shorter hauls.

6. (103)—Huron takes exception to item 103. The following should be added to such item:

"These bids were asked for and submitted during the period of the NRA when the Cement Code required the filing of prices with the Code Authority."

7. (106) Huron takes exception to item 106. The Report should state that:

"There was no general understanding that the Wyandotte base should not be used except in figuring prices to Michigan points. Huron did not use the Wyandotte base for figuring other than Michigan points, since it was not not then engaged in the business of selling cement in Ohio. Later it opened its Toledo plant and the Toledo prices applied in northwestern Ohio, Toledo being nearer the destinations in such territory."

Huron further excepts to the statements in the second paragraph of item 106. The Report should state that Huron's quotations reflecting a base price of $1.35 per barrel at Saginaw were issued on March 4, 1933. The Indiana letting did not occur until March 23, 1933. The Huron prices applied at the Huron plant at Saginaw and

did not reflect a base price at Aetna's plant. Saginaw and Bay City are, however, on a parity as to freight rates. Wabash on May 1, 1933, quoted $1.25, at the Aetna Bay City plant. The announcement of the Saginaw price by Huron had no relation to any controversy with Aetna in respect to bids in Indiana but came as a natural result of the opening of Huron's Saginaw plant. On January 2, 1937, effective January 4, 1937, Huron adopted a flat price of $1.70, less sacks, for all of the lower Peninsula of Michigan. This automatically wiped out both Huron's Saginaw base price, Aetna's base prices and the Bay City prices, which had been announced by Wabash.

Note: The Huron Saginaw price was effective March 10, 1933. (Tr. 33398) This date marked the opening of the plant in Saginaw. The price set was $1.35 Saginaw. This was a slight increase over the Aetna price at its Bay City plant. (Tr. 33400) The railroad rates from Bay City and Saginaw are, in almost every instance, the same (Tr. 33399) so that the Saginaw price affected Aetna's Bay City price.

On April 17, 1933, Wabash quoted in that territory on the basis of $1.25 the Aetna Bay City plant. (Tr. 11097) On May 1, 1933 Huron dropped its Saginaw price to $1.25.

In July, 1933, Huron advanced the Saginaw price to $1.65, but on September 15, 1933, Wabash cut this back to $1.50, which price was met by Huron. (Tr. 33405).

Huron put no price on the Aetna plant. It put a price on its own Saginaw plant when that plant was opened. This affected Aetna because of the parity of rail rates between Saginaw and Bay City. The reduction of the Aetna Bay City price to $1.25, this establishing a base price on the Aetna plant by Wabash in April, 1933 was the act of the Wabash Portland Cement Company. (Tr. 10187, 11097)

The Indiana bids which witness Cree asserted to be the reason for the Wabash action at Bay City occurred March 23, 1933, C. E. 18 A-C. Huron had already established its plant and announced its Saginaw price on March 10, 1933, so that the Indiana letting was not the cause of Huron's action.

8. (114-119)—Huron adopts such exceptions as may be taken by counsel for the Institute to items 114 to 119. It

specifically excepts thereto for the reason that the Report fails to state that:

"Huron has maintained and now maintains a fully equipped rate and traffic department, including files of railroad tariffs and competent traffic men. (Tr. 33296 et seq.) It has at no time used the so-called Cement Institute books to determine prices. (Tr. 33526, 33300) It itself computes the rates on its shipments and from its own files prepares its own rate sheets (Tr. 33302) and on its own information determines railroad rates when such information is necessary or desired in the fixing of prices. (Tr. 33307) It has not used the so-called Institute Rate Books except to check against the information contained in its own rate sheets."

9. (120)—Huron excepts to item 120. The Report should state that:

"Huron has consistently used and advocated the use of trucks in making cement deliveries. The reason therefor was that the truck delivery carried the cement direct to the jobs and saved the dealer or purchaser extra truck hauling expense. (Tr. 11055-6) As Huron established its auxiliary plants it provided at each of them facilities for loading and using trucks and installed truck delivery. (Tr. 11041-43, 256, 278-80, 282, 369-70) The growth in the use of trucks at its several plants is exhibited on R. E. 63 (Tr. 11256 and C. E. 239) Truck deliveries at all points have risen from 38.6% in 1925 to 74.2% in 1938. Railroad car deliveries have fallen from 61.4% in 1925 to 25.8% in 1938. At Detroit freight car deliveries have fallen from 37.4% in 1925 to 1.7% in 1938 and truck deliveries have risen from 62.6% in 1925 to 98.6 in 1938. At Cleveland freight car deliveries have fallen from 54.8% in 1925 to 6.1% in 1938. Truck deliveries there have risen from 5.2% in 1925 to 93.9% in 1938. The only points where freight car deliveries exceed truck deliveries are Duluth, where the distribution is over a wide territory in the northwest, impossible of access by truck. The prices of Huron were in many instances f.o.b. mill prices, that is, they were not based on rail freight rates. Such was the case with the following: The Fort Peck contract (C. E. 329 A-Z); Fort Brady, Saulte Ste. Marie (Tr. 33318); WPA Procurement contract (Tr. 33671-2, 33696); sales at Detroit (Tr. 33672-3); sales to Lighthouse Service (Tr. 11365); the so-called

"Good Friday" bids (Tr. 30545-6, 33319, 33688-9); sales at Duluth (Tr. 33326-27, 33335, 33582-3, 95-97); to Cleveland dealers (Tr. 33319, 33488-9, 33594-600); Buffalo for truck deliveries (Tr. 33429); Oswego for truck deliveries (Tr. 33344-5); at mill (Tr. 33317-443); Alpena and Wyandotte (Tr. 33504,5,7); Toledo (Tr. 33317)."

10. (121)—Huron excepts to item 121. The Report should state that:

"Huron has never added 15c per barrel to the mill base for cement loaded on customers' trucks at the mill. Huron has sold on a true f.o.b. mill price to truck between 1933 and the present time and has made mill deliveries to trucks at the mill price and not on the delivered price without deduction of the transportation charge. (See references, supra, item 34.)"

11. (122)—Huron excepts to the second paragraph of item 122. The Report should state:

"Huron did not find the loading of trucks an inconvenience and an extra expense or 'even dangerous'. There is no evidence that it opposed the return of extra sacks by truck."

12. (123)—Huron excepts to item 123. The Report should state:

"Huron was opposed to diversion of shipments in transit because of its disruption of relations between the dealers, since it permitted a dealer to sell cement in territory served by another dealer, and so interfered with Huron's sales. But Huron took no steps to actively oppose such diversions (Tr. 33502, 33507, 33512, 33688), except that in the State of New York it stamped on its invoices a clause to the effect that diversions in transit were not permitted without authority from the consignor. It has received, however, no request for such diversions and has no knowledge of such diversions having been made either in New York or in other territories which it serves. (Tr. 33575, 33341)"

13. (128)—Huron excepts to item 128. The Report should state:

"Huron did not adopt a sales contract form containing provisions against diversion and penalizing the practice".

14. (130)—Huron excepts to item 130. The Report should state:

"Huron quoted f.o.b. mill prices in many instances (see

supra). It quoted delivered prices to dealers and contractors for the reason that delivered prices were requested of it. (Tr. 33677) At many points a purchaser could not readily ascertain the cost of transportation and his total delivered cost, if he purchased on an f.o.b. mill price. Huron's policy was to quote prices either on an f.o.b. mill basis or on a delivered basis, according as to the purchasers or the market requested. (Tr. 33677)"

15. (131)—Huron excepts to item 131. The Report should state:

"Huron has knowledge of the land grant rates existing in its territory. Its traffic manager had for some years had the information as to these rates and while these rates were not easy of determination, the traffic manager, by reason of his railroad experience and the information in his files, was able to determine such rates. Huron, when requested by the Government, either used the land grant rates or, in case of a request for f.o.b. mill prices, made such a price, as witness the Fort Peck contract (Tr. 1638); W.P.A. Procurement bids (Tr. 33671, 33672, 33696); 'Good Friday' bids. (Tr. 33046, 30543, 30546) See also supra for instances."

16. (132)—Huron excepts to item 132. The Report should read:

"Huron did not file said control clause with the Code Authority. Huron did not make any bid where the estimated land grant rate used to make up the 'destination cost' price by adding to the mill net after deducting commercial freight and the prevailing 'destination price' was higher than the actual land grant rate. (Tr. 1638 ff, Tr. 33671, 33672, 33696, C. E. 178-C, R. E. 193, 4, Tr. 1574, 1575, 1630, 1633)".

17. (134)—Huron excepts to item 134. The Report should read:

"After the end of NRA, Huron filed no further prices with the Institute's Trade Practice Committee. (Tr. 33364, 33708, 33709) There is no proof that Huron received from the Institute information as to land grant rates."

18. (135)—Huron excepts to item 135. The Report should state:

"No purchasing agent failed to get regular f.o.b. mill bids when requested from Huron either under the Code Authority or since its expiration."

19. (137)—Huron excepts to item 137. The Report should state:

"Huron did not fail, neglect or refuse to bid direct on PWA jobs and did not refuse to permit orders sold by dealers to be shipped on Government bills of lading. Huron did not cooperate with any dealer organizations in this respect or as stated in said item."

20. (138)—Huron excepts to item 138. The Report should state:

"Huron did not refuse to make f.o.b. mill prices; it did not regard such a practice as one which would not work, or as one which disrupted the price structure; it did make f.o.b. mill sales (see supra)."

21. (141)—Huron excepts to item 141. The Report should state:

"Huron did not adopt the marketing plan set forth in the 'Method of Marketing Cement'."

22. (142)—Huron excepts to item 142. The Report should state:

"Huron did not accept or adopt any proposal or understanding that the dealer was entitled to or should receive 15c per barrel profit. There is no proof to that effect."

23. (143)—Huron excepts to item 143. The Report should state:

"Huron did not receive the so-called Master List as therein described or a list of 'Equipped Cement Dealers'."

24. (148)—Huron excepts to item 148. The Report should state:

"Huron developed its own contract provisions relating to terms of payment and discounts, not only prior to 1931 and the Code period but thereafter. Its several quotation, order and contract forms were submitted in evidence. They show substantial variations in form as compared to those of other respondents (R. E. 2394 A-Z 40)."

25. (150)—Huron excepts to item 150. The Report should state:

"Huron discounts, allowance for returned sacks, quotations of differentials on cloth, paper and bulk deliveries, guarantee on specific sales contracts, provision as to payment of transportation charges all are as stated. But Huron did not use the diversion clause as stated, and Huron did make special reduced prices on certain large quantity orders."

26. (151)—Huron excepts to item 151. The Report should state:

"Huron was not concerned with imported cement (Tr. 33673, 4); it had no competition therewith and made no arbitrary or zone prices in the territory referred to in said item; it engaged in no practices whatever designed to meet the competition of foreign or imported cement."

27. (158)—Huron excepts to item 158. The Report should state:

"Huron established on January 4, 1937, flat delivered prices throughout the Lower Peninsula of Michigan; one applicable to all the Peninsula except Wayne, Oakland and Macomb Counties and another applicable to those three counties. It continued to make sales on that basis until April 2, 1928. This was called the Michigan Plan. (Tr. 11098, 11111, 11141-2, 11226, 11273, 33411) Huron installed the flat prices in part as a competitive measure to meet competitive conditions due to a price war between Aetna and Wabash. This so-called Michigan Plan put into effect a price lower than those of either of those mills. (Tr. 33669, 34465) Huron believed that with its plants at Alpena, Saginaw, Muskegon, Detroit and Toledo it could make deliveries at all Lower Peninsula points at approximately the same cost, one as against the other. It was found, however, that the delivery cost was not the same as had been thought, the cost from Muskegon being particularly in excess of the estimate. (Tr. 11144, 11275, 11441) The Plan did not increase Huron's tonnage. (Tr. 33670) For these reasons the Plan was abandoned. There was no consultation with competitors when this Plan was instituted and none when it was discontinued. (Tr. 11276) Huron also made prices in Cleveland and Buffalo that were arbitrary in the sense that they were not constructed on a basing point or in accordance with any so-called multiple basing point system. They were prices required to meet competition. Such prices were not designed to correct differences between trucking and railroad rates or other price variables. The record does not show that Huron furnished a list of these prices to its salesmen."

28. (160)—Huron excepts to item 160. The Report should state:

"Huron did not resort to the Institute for control or direction of its policies; it found in the Institute no tribunal that could settle competitive disputes (C. E. 41.8

A-D); it definitely took the position that the Institute did not attempt to do so and could not do so; it did not look to the Institute for the establishment of its policies."

29. (163)—Huron excepts to item 163. The Report should state:

"The Wyandotte base applied to Michigan points and was not used by Huron in Ohio for the reason that it then did no business in Ohio. Later, after 1929, when Huron established its Toledo plant, the Toledo base was used in Ohio and adjacent territory."

30. (164)—Huron excepts to item 164. The Report should state:

"While Huron has eleven mills, its situation is essentially different from that of the other producers referred to in said item 164. Ten of the Huron mills are auxiliary mills established in the principal cement markets on the Great Lakes. (R. E. 2392, Tr. 33626) The raw material out of which cement is produced is produced only at Alpena. The cement is there manufactured and from the Alpena mill is shipped in bulk by water to the auxiliary mills (Tr. 11046-7, 11247), where it is stored and packaged and from which its sales, with the exception of the Alpena sales, are made. (Tr. 11248, 11038-9) In making its prices at the several points at which auxiliary mills are located Huron has particularly considered local conditions. Prices at these several points have always varied one from the other. Huron has assumed leadership in making downward price changes. Huron took individual action in establishing the Michigan Plan which wiped out the base price established by Wabash on the Aetna plant at Bay City, Michigan. This action by Huron was entirely individual to it, and was taken without consultation with or cooperation by any other cement producer and no other producer was consulted when it was withdrawn." (Tr. 11144)

31. (165)—Huron excepts to item 165. The Report should state:

"In the territory served by Huron and its several plants price cutting has been frequent since 1931 and 1932. Many changes in prices have been made in the period since those years. In Michigan from April, 1932 to February 10, 1940, Huron recorded twenty price changes. In Ohio from August 10, 1932 to May 25, 1936, it recorded eight price changes. In Milwaukee it recorded five price changes from 1932 to 1937 and in Buffalo and Oswego it recorded five

changes between 1932 and 1938. The changes herein referred to were general changes applicable in the territory. They do not include numerous individual price changes made on individual sales. Mr. Meyers referred to a great number of these. (Tr. 33383-492 et seq.) It was whenever these individual price changes became frequent that Huron made a general price change to meet them."

32. (166)—Huron excepts to item 166. The Report should state:

"The record does not show that Huron uniformly adhered to any zone or arbitrary prices. It shows that it did not conform with the stated policies respecting trucking. It shows that it did not use the Institute freight rate books. It shows that in its bids to the Government, with two exceptions, it has acted independently. While certain of its prices can be said to have been built by the multiple basing point method only a minor part of its product moved to points outside the cities where its plants were located and prices at the points where the plants were located were Huron's own prices. It did not conform to the so-called basing point system in many respects. It sold substantial quantities of cement on plant prices; it gave the United States Government the benefit of land grant rates; it made mill prices without restriction as to disposition; it encouraged delivery of cement by trucks. In other respects its practices and policies differed materially from those charged in the complaint to have been the practices and policies of the members of the Institute. As a result of Huron's competition and its practices and price-making policies, the level of cement prices in the Great Lakes area, particularly in Michigan, in which latter State Huron is the dominant cement producer, has been and is lower than that in other parts of the United States. It is significant that as Huron pushed its distribution into the Great Lakes area in practically every instance its entry into the new area was followed by lower cement prices."

33. (183)—Huron excepts to item 183, particularly to the second paragraph thereof. The Report should state:

"J. B. Johns of Medusa suggested to Mr. Crapo of Huron in 1932 that Cleveland prices should be built on the Buffington base, but Mr. Crapo expressed the opinion that the Cleveland prices should stand by themselves and should have no relation to the Buffington base. (Tr. 11030-5)"

Huron also particularly excepts to the last paragraph of

item 183. If this paragraph stands, there should be added thereto the following:

"Huron participated in no such meetings or conferences and joined in no effort to regulate or suppress trucking, but on the other hand at all times made use of trucking and advocated the use of trucks in the delivery of cement."

34. (184 to 187). Huron excepts to Items 184, 185, 186 and 187 as not setting forth an accurate resume of the testimony in connection with the so-called "Cree incident." Particular inaccuracies in said Paragraphs to which Huron takes exceptions are as follows:

(a) The finding that a good business had been built up for Aetna by Messrs. Lingeman and Cree, General Manager and Sales Manager, whereas, in fact, Aetna showed very large losses on its business.

(b) The statement that Aetna's mills ran 70% of capacity while others were running 20% and 24%. Huron, on the average, from 1925 to 1933, ran 71% of its capacity as against Aetna's 65.8%. (C. E. 2895).

(c) The finding that "this and other such meetings were held for the discussion and settlement between competitors of matters in price and policy, in which some of the respondents above were represented."

(d) The statement as follows: "Notwithstanding these meetings, understandings, formulations of policies and agreements, complaints against Cree and his competitive methods continued to be made to Johnson . . ." and the inference therein that there had been understandings and formulations of policies and agreements between Aetna and its competitors.

Respondent Huron further excepts to said findings in said Paragraphs 184 to 187, inclusive, for the reason that they do not include a statement as follows:

During the period the NRA Code was in effect, numerous complaints were made that Aetna was selling at prices which varied from those which had been filed or were otherwise effective under the cement codes (Resp. Exs. 2426, 2636 D; 2028; 2029; Com. Ex. 1016; Tr. 982; 38,782; 3882). These complaints were particularly vigorous in the Spring of 1935 and Johnson attempted to develop a program for the management and sales of Aetna which would meet the complaints and would eliminate current heavy losses which the Company had suffered. Discussion of these complaints and his program continued after the NRA period had ex-

pired and until December, 1935, when Johnson, having prepared a statement of instructions for Cree and Lingeman, presented it to these two officials of his Company, while they were in attendance at a meeting of the Portland Cement Association in Chicago. He invited into the room, when this was done, officials of other companies. No agreement was entered into between the Aetna's officials and the officials of the other companies in respect to the matters contained in Johnson's instructions to Cree and Lingeman. These instructions had mainly to do with Aetna's practices of maintaining warehouses and its practices with respect to trucking. So for as Huron was concerned, no agreement of any kind was then made and the practices of Huron and of Aetna which had heretofore never agreed did not thereafter agree. (Tr. 34,402-03; 34,499-500, 11276) This meeting was not held for the discussion and settlement between the Huron or other competitors of Aetna on the one part and Aetna on the other of any matters of price or policy.

In July, 1936, Johnson finally discharged Cree and appointed Calvin, formerly with the Consolidated Cement Company as General Manager. This change in management was not dictated by Cree's practice of cutting prices. This was demonstrated by the fact that after Cree's discharge, prices in Michigan, although they were then lower than anywhere else in the country (Tr. 6338, 30,056-57; 35,906-08-12) were still lower. In Detroit they went to $1.50 and finally to $1.38 where before they had been $1.70 per barrel (R. E. 3554, 3561). That Aetna's use of warehouses was one of its principal difficulties is borne out by the fact that under the new management of Calvin, warehouses were discontinued as uneconomical. But trucking was continued (Tr. 30,128) and distributors were continued. (Tr. 30,022) Aetna continued her practices which had been objected to in the NRA plan. It continued to sell the Indiana Farm Bureau. (Tr. 30,156) It made special prices below the openly quoted market prices. (Tr. 30,173)

35. (188-195)—Huron excepts to items 188 to 195. The Report should state:

"Huron had no part in any activity directed to the prevention of the installation of new plants. It has established ten auxiliary plants at points on the Great Lakes, as follows: Duluth, Milwaukee, Detroit, Saginaw, Muskegon, Toledo, Cleveland, Buffalo, Oswego and Green Bay. The record does not show any efforts made by any of the respondents to discourage Huron in the establishment of these

plants, other than active competition with such plants in the sale of cement in the territories in which they were established. Huron had no part whatever in the discussions or activities respecting the establishment of a cement plant by TVA. The record does not show that Huron was advised of the protests of the Cement Institute as to the loss by the Reconstruction Finance Corporation referred to in item 191. The record does not show that Huron received any information from the Bureau of Information of the Cement Institute, which information could have been used in opposition to the establishment of any cement plants. The record does not show that the Huron had any part in any opposition to the efforts referred to in items 193 and 194."

36. (197-9)—Huron excepts to items 197, 198 and 199. The Report should state that:

"The record does not disclose that Huron made any report whatever to Burns and Clark or answered the questionnaires which were used in connection with that survey."

37. (200)—Huron excepts to item 200. The Report should state that:

"Huron filed its prices with the Code Authority in conformity with the Cement Code during the effective life of the NRA but at the end of the NRA period Huron did not file prices and terms with the Trade Practice Committee of the Institute. The only information as to production and sales filed by Huron at any time was that which it filed for the purpose of computation of its dues as a member of the Institute."

38. (203)—Huron excepts to item 203. The Report should state that:

"The record does not show that Huron checked any transactions or that any contracts of Huron were checked and reported on by the Institute to the members of the industry. No contracts were cancelled by Huron as a result of information obtained in the course of such checking."

39. (204)—Huron excepts to item 204. The Report should state:

"Huron makes an allowance of 10c per sack on return bags. This has been for years an established practice in the industry and such practice by Huron is not shown to be the result of any understanding or agreement by Huron with other respondents."

40. (205)—Huron excepts to item 205. The Report should state:

"The record does not show that Huron ever made a

shipment for another respondent, nor did any other respondent make a shipment for the account of the Huron."

41. (212-219)—Huron excepts to items 212 to 219. The Report should state:

"The record does not show as to such report as Huron may have made to the Association of American Portland Cement Manufacturers or to the Cement Manufacturers Protective Association, but it does show that Huron made no reports to W. S. Mallory. The record does show that Huron in 1926 to 1933 subscribed to a statistics service conducted by W. S. Mallory but from 1933 to the present time Huron did not report its statistics to Mr. Mallory or to the Institute for the use of the statistical service. The only figures reported to the Institute were the figures on which a computation was made of Huron's dues."

42. (220)—Huron excepts to item 220. The Report should state:

"Huron issued no so-called secretive communications. It extracted no letters from its files. It did not throw out incoming letters containing information which might interest the Government."

43. (228)—Huron excepts to item 228. The Report should state:

"The rivalry between Huron and other competitive respondents serving the area which Huron serves did manifest itself in essential differences of sale policy, trucking policy, in sales f. o. b. mill, and in delivery sales and in prices, and in both individual and general price levels. It manifested itself in the bids by Huron on large Government orders such as the 'Good Friday' bids and WPA. It is testified to by the representatives of many of its competitors: Bessemer (Danke] 11,343-5, 13,353, Warren 32,099); Middlebranch (McKeag, 12,217-219); Universal (Reiter, 4146 et seq.; Affleck 34,992; Stone 35,177); Lehigh (Bowen 26,545, 26,881, 26,883, 27,267); Keystone (Scott 27,444); Aetna (Calvin 30,016, et seq.); Federal (Bates 30,490, 30,516, 30,545-6, 30,590, 30,778, 30,788); North American (Porter 33,735); Edison (Sweeney, 35,695, 35,814); Wolverine (Nelsen 35,896); Pittsburgh Plate Glass (Letzkers 37,687, 37,851); Penn Dixie (Browder, 38,043, 38,152); Petoskey (Lucas, 38,741); Alpha (Coogan, 23,652); Hercules (Brobston, 25,986).

Respectfully submitted,

Huron Portland Cement Co.

By Hal H. Smith,

Its Attorney.

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption 3167)

EXCEPTIONS OF RESPONDENT MARQUETTE CEMENT MANUFACTURING COMPANY TO THE TRIAL EXAMINER'S REPORT ON THE EVIDENCE.

(Received Nov. 10, 1941.)

Now comes the Respondent Marquette Cement Manufacturing Company (hereinafter referred to as Marquette), by its Attorneys, Edward A. Zimmerman and Harold W. Norman, and excepts to the Trial Examiner's Report Upon the Evidence hereinbefore filed, as follows:

The Complaint and Answer.

1. For that the said Examiner improperly and contrary to the rules of the Federal Trade Commission included in the said Report on pages 3 to 5, inclusive, a "Synopsis of Complaint", and on page 6 a synopsis of "The Answers," and

2. For that the said synopses are inaccurate and misleading and do not correctly represent the substance of the complaint or of the several answers or of the separate answer of this Respondent.

That among the inaccuracies in the "Synopsis of Complaint" are the following:

That Count I, Paragraph 1 of the Complaint charges:

"That the Respondent The Cement Institute is engaged in the manufacture and sale of portland cement,"

whereas the Complaint in fact charges in Count I, Paragraph One that the Cement Institute is an unincorporated trade association, of which Respondents are members, and in Paragraph Two, the Complaint states that the Institute is not engaged in commerce:

That Paragraph V of Count I charges:

"That Respondents *cooperatively* employed what is known as the multiple basing point system,"

whereas such statement should have included the preceding explanatory clause so that it would read:

"in pursuance of the combination alleged in paragraph Four hereof, said Respondents * * * have cooperatively employed what is known as a multiple basing point system of pricing."

The preceding Paragraph Four referred to contains the controlling charge of the Complaint. This charge is that the Respondents have maintained and had in effect at the time of the filing of the Complaint, a combination to restrain competition in price among themselves in commerce among the states and that "the said combination is made effective by mutual understanding or agreement to employ and by the actual employment of the methods and prices set forth in Paragraph Five to Seven, inclusive, of this Count." Thus the charge in Paragraph Four of the Complaint qualifies and modifies the statement in Paragraph Five, so that it must be taken to mean that the use of the methods and practices described in Paragraph Five, that is, "what is known as the multiple basing point system of pricing" was employed "by mutual understanding or agreement" in the course of the combination to restrain trade charged in Paragraph Four. This same qualification applies to every one of "the methods and practices set forth in Paragraphs Five to Seven, inclusive."

That Count I, Paragraph VI, of the Complaint charges "That Respondents submitted identical bids *concertedly* arrived at," whereas there is no charge in the complaint that any bid submitted by Respondents was "concertedly arrived at," but the charge is that "by mutual understanding or agreement" the Respondents used a method of pricing described in Paragraph Five of the Complaint, which resulted in the quotation of delivered prices by every producing Respondent identical with the delivered prices quoted by all other Respondents seeking to do business at any given destination in the United States, and Paragraph Six of the Complaint purports to give "illustrative examples of instances of identical bids received by various branches of the Federal Government from producing respondents."

3. The Examiner has improperly included in his aforesaid, "Synopsis of Complaint" detailed reference to Paragraph Eight of the Complaint and also Paragraph Nine thereof, whereas the Examiner should have found that trial counsel for the Federal Trade Commission in the course of the hearing before the Examiner stated for the

record that the said Paragraphs Eight and Nine of the complaint, are in fact merely pleader's conclusions under which no testimony is to be considered as proof of the existence of any combination charged in the Complaint. (See statement by Com. Counsel MacIntyre, R. 37495-6); and

4. For that the Examiner in his Report under the title "The Answers," has treated all of the several answers filed by the Respondents, as if they were in substance the same, and has set forth the conclusion that "it is admitted that in some cases there is a uniformity of methods and quotations," whereas the Examiner should have found that the Respondent Marquette filed an answer to the Complaint which was separate and distinct from any other answer filed on behalf of any other respondent and that Marquette did not make any such admission in its Answer to the Complaint; and

5. The Examiner has under the title of "The Answers," set forth, "Respondents contend further that their methods of pricing and distribution are more economical and more in accord with the public interests than any other methods that could be employed by them," whereas, the Examiner should have found that the Respondent Marquette made no such contention or allegation in its Answer or in any evidence offered by it or in its behalf, and it has persistently contended that there is no question in the case as to whether or not the methods of pricing and distribution used by it or other respondents are or are not more or less economical or more or less in accord with the public interest than any other method that could be employed, but that the sole question at issue is whether or not the methods of pricing and disributing used by the Respondents are used as a means of effecting a combination in restraint of trade as charged in Paragraph Four of the Complaint.

6. The Examiner has failed to set forth any part of the Answer of Marquette, whereas the Examiner, if he included any reference to the Answers of the Respondents, should have shown sufficient references to the said Answers to indicate what issues were actually formed by the Complaint and the said Answers, in the light of and as modified by agreements, statements and admissions made by Counsel for the Commission during the proceeding before the Examiner; and the Examiner should have particularly set forth that the Answer of Marquette specifically denied

every material allegation of the Complaint, and that Marquette more specifiaelly set forth in its Answer to the Complaint the following:

Marquette denied that any officer, individual trustee, committee, bureau or other agent of the Respondent Institute, has had any power to bind the Institute, or the members thereof, as to any matter affecting the policies, functions or operations of the Institute, but on the contrary that the Respondent Institute and its several trustees, officers, committee, bureaus and agents as shown by the Articles of Association of the said Respondent Institute, extant as of the date when the said Respondent became a member of the Institute, had only limited powers and purposes as provided in the said Articles of Association, which powers were to be exercised solely by a board of trustees in meetings duly assembled, and that the purposes were limited to those set forth in the said articles; that said Respondent was not at any time a member of or affiliated in any manner with the Respondent Cement Institute prior to the 15th day of June, 1933, and that it joined the said Institute at that time, relying solely upon the new Articles of Association, extant as of that date, and for the limited purpose of doing its part under the National Industrial Recovery Act toward the formulation and adoption of a Code of Fair Competition for the industry, and upon the information that other members of the industry were joining the Respondent Institute for similar purposes; that the said Respondent further specifically denied that the Institute is, or has been, at any time, engaged in aiding this Respondent, or within the knowledge of this Respondent, in aiding any one or more of the producing Respondents in carrying out any unlawful method or any method which directly or indirectly or substantially affects competition among the members of the Institute, so as to hinder, lessen, restrict or restrain it;

That the Respondent, Marquette, specifically denied that it is or ever has been a party to, has, or has had any knowledge of any mutual understanding, agreement or combination to sell cement at destination prices or at any agreed prices or in any particular manner; that Marquette and, to the best of its information and belief, every other producing respondent within its marketing area has at all times been free to make any price for, and to sell cement in any manner it has chosen, and that Marquette and the

other producing respondents referred to have so acted; that basing point terminology has been inaccurately and erroneously used in referring to the cement industry, and that the destination price method which has generally prevailed in the industry is to be distinguished from so-called single or multiple basing point systems such as have prevailed in other industries;

That Marquette further denied any knowledge of the alleged fourteen illustrative examples of alleged identical bids received by various branches of the Federal Government, as set forth in paragraph six of the Complaint, except as to the first and fifth example, the first being for deliveries at Fort Peck, Montana, and the fifth at Vicksburg, Mississippi; that as the the first of these two Marquette denied that it was a typical example of uniform delivered prices under any particular method of pricing, that on the contrary as to this project the bids were submitted at a time when the National Industrial Recovery Act was in full force and effect as was also the Code of Fair Competition which was adopted and approved under the said act, for the cement industry; that the land-grant freight rates applicable to the bids on the project were set forth in the proposals submitted by the War Department of the United States; that a destination cost bid had been filed with the Code authority, under the said code, by one of the producers and this filed price had been published to the industry according to the provisions of the code so that it was known to all producers prior to making of respondent's bid and other bids, and that the Respondent, in bidding on said project was merely meeting the bid so filed by one of its competitors, in accordance with the requirements of the National Industrial Recovery Act and the said Code of Fair Competition; that as to the project at Vicksburg, Mississippi, Marquette denied that the bids were identical as alleged in the Complaint;

That as to the freight rate books referred to in the Complaint as published by the Cement Institute in making effective the alleged combination in restraint of trade, the respondent, Marquette, specifically denied that it had made any use thereof at any time for any purpose and Marquette stated that, on the contrary, it has for many years, long antedating its membership in the respondent institute continuously maintained its own traffic department which did and still does continuously collect and assemble

official tariffs relating to the rates of freight on cement in the territory in which the said respondent operated and does operate;

That Marquette further set forth that the freight-rate schedules published by the railroads or traffic associations of railroads are a matter of great complexity and intricacy and that therefore it has been and still is necessary for freight rates on shipments of cement to be figured by experienced experts such as the respondent has employed, and that it would be practically and economically impossible for contractors, dealers, and other customers who purchase respondent's cement to make accurate use of freight-rate schedules published by or for railroads;

That Marquette specifically denied that it had individually or by agreement or combination with others, made any effort to thwart the Government of the United States in securing f.o.b. mill prices on cement at any time, or in obtaining the full benefit of land-grant rates, and set forth that the government has always had it in its power to obtain the full benefit of such land-grant rates, and that Marquette has, to the best of its ability, cooperated with and aided the Government of the United States and its officials in obtaining such maximum benefits and that the respondent has frequently quoted prices on, and sold cement to the Federal Government on an f.o.b. mill basis.

That as to Count II of the Complaint Marquette denied the charges therein made that destination prices are not the actual prices within the meaning of the Clayton Act, as amended by the Robinson-Patman Act, and denied the alleged price discrimination, and denied that it has done anything tending to eliminate price competition.

Limitation and Definition of Issues.

7. For that the Examiner has failed to include in his report any of the numerous agreements, admissions and statements made by trial counsel for the Federal Trade Commission and by the Trial Examiner in the presence of and with the tacit approval of counsel for the Commission in these proceedings which were intended to, and did, limit and define the issues in this proceeding. Whereas, the Examiner should have found and set forth the following among other such agreements, admissions and statements:

A.

Issues.

Conspiracy is the only issue in the case (Counsel for Commission—Tr. 39824). The case concerned wholly with the question of an alleged combination (Counsel for Commission—Tr. 39824).

Paragraphs 8 and 9 of the Complaint are merely pleader's conclusions and the proof of the allegations contained therein is not to be considered as proof of the existence of a combination or conspiracy (Counsel for Commission—Tr. 37495-6).

The Commission does not charge that Respondents agreed on the bids they would make, but the basis of the Commission's case is the use of a system by the Respondents (Counsel for Commission—Tr. 27013).

The Complaint makes no point whether Respondents price f.o.b. mill or whether they price f.o.b. destination (Counsel for Commission—Tr. 37825). The Commission never contended and does not intend to infer that it was an invariable rule that Respondents quoted f.o.b. destination (Counsel for Commission— Tr. 21432). Whether or not f.o.b. mill prices are more advantageous is not a question in the case (Counsel for Commission— Tr. 37834).

The level of cement prices is not in issue (Counsel for Commission—Tr. 29176). The level of cement prices in comparison with substitute materials is not an issue in the case (Counsel for Commission—35318). The reasonableness or fairness of cement prices is not an issue and evidence with regard thereto was stricken and refused admission (Examiner—Tr. 32329-30; 40126-7). Costs and profits are not in issue (Counsel for Commission—Tr. 26391-2, 33886; Examiner—Tr. 38850, 41456-7). There are no unfavorable inferences to be drawn by reason of cost practices (Counsel for Commission—Tr. 27428-30; 27430).

The Commission makes no charges with regard to Mallory's forecasts of general conditions or demand (Counsel for Commission—Tr. 46755).

The Commission makes no charge that the N. R. A. Code provisions as to allocation of business, or the so-called Mallory Plan or the so-called Storey Plan of allocation of business were ever put into effect or operation (Counsel for Commission—Tr. 33070; 37192). No allocation of business plan was ever approved or went into operation

(Counsel for Commission—Tr. 29195, 37192). Evidence showing that there was no restriction of production by Respondents was rejected by the Examiner (Tr. 37775-6).

The Respondents did not immediately receive the full effect of a price advance (Counsel for Commission—Tr. 40150).

Whether barge delivery was more or less expensive than rail delivery is not an issue (Evidence thereon was kept out of the record by the objection of Counsel for the Commission. Tr. 37133; 37135-47).

There was no conspiracy to develop over capacity (Counsel for Commission—Tr. 36863). Excess capacity in the cement industry was constructed in the belief that it was warranted by conditions (Counsel for Commission—Tr. 36866, 38690). Over-capacity in the cement industry is necessary to take care of varying demands (Examiner—Tr. 37764). There is no evidence of any agreement either to increase or reduce capacity (Counsel for Commission—Tr. 38689).

The Commission's charges of an alleged conspiracy or agreement to eliminate trucking relates to a purported conspiracy among members of the Cement Institute in 1931 and 1932 (Counsel for Commission—Tr. 40849).

B.

Admissions of Fact.

The United States Government makes awards solely on the basis of the total cost of delivered cement at the destination (Examiner states witnesses on both sides have so testified—Tr. 28049; Examiner—Tr. 32134; Counsel for Commission—Tr. 36299; Examiner—Tr. 42277-8). Every buyer must know the cost of cement delivered at his destination (Counsel for Commission—Tr. 32674; Counsel for Commission—Tr. 42526; 34429, 36733-4, 36889).

"The Government, like any other purchaser that wants to use cement at a given place, will naturally figure the cost of it from various sources, at the place it wants to use it, in order to determine which is the most advantageous purchase, no dispute about it" (Counsel for Commission—Tr. 32672-3).

Delivered prices in the cement industry are more than 26 years old (Counsel for Commission—Tr. 9743). Cus-

tomers ask for prices on delivered cement (Examiner—Tr. 42277-8) (Examiner states abundant evidence to this effect —Tr. 32140, 36890-1). Contractors demand the price of delivered cement (Examiner refused evidence because record shows such established custom—Tr. 30531-5, 38856-7). Dealers desired prices for delivered cement (Counsel for Commission admitted that numerous dealers if called would support this poin —Tr. 36734, 36889-90, 36797-8). The usual method of requesting business is on a destination basis (Counsel for Commission—Tr. 34429).

It was shown at least a hundred times by both oral and documentary proofs that customers approved of Respondents' policies (Examiner—Tr. 35999).

The basing point system goes back to about 1900 (Counsel for Commission—Tr. 9735). There is a difference between a policy of selling at delivered prices and the use of the basing point system (Counsel for Commission—Tr. 33371).

The building materials dealer is the backbone of the cement industry (Counsel for Commission—Tr. 28570; see also Tr. 25656, 26023, 32187, 32188). Dealers perform valuable services in the merchandising of cement (Examiner rejected further evidence as cumulative of abundance of evidence on subject—Tr. 32187-8).

Respondents endeavor to sell as much cement as possible (Counsel for Commission—Tr. 35776). In this endeavor respondents attempt to sell to the same customers at the same time (Counsel for Commission—Tr. 32081). In an effort to sell as much cement as possible Respondents offer varying kinds of service and technical advice and use various other types of sales efforts (Counsel for Commission and Examiner—Tr. 36890, 32082).

Friendly dealers and contractors when offered lowered prices or better terms or conditions, or special services, will go to their usual source of supply and offer them the business (Counsel for Commission—Tr. 39231-2). In addition to this source of information, Respondents actively investigated to ascertain prices being offered by competitors in order to compute their own prices (Examiner rejects further evidence of this as cumulative—Tr. 39610-18).

The 40¢ charge for cloth sacks goes back for many years (Counsel for Commission—Tr. 5987).

Demand in any mill's sales territory fluctuates and is not uniform (Counsel for Commission—Tr. 37196). From 1929

to 1929 the cement industry as well as almost all industries, showed sharply increasing demands (Counsel for Commission—Tr. 37179).

Numerous Respondent companies joined the Cement Institute in anticipation of the program that was initiated under N. R. A. (Counsel for Commission—Tr. 33912). After the Schechter decision in 1935 the government officials urged adherence to the N. R. A. principles, including continuation of codes as voluntary arrangements in industries (Counsel for Commission—Tr. 4174).

Conditions along the Atlantic Seaboard did not concern or affect the Middle West (Counsel for Commission—Tr. 6537).

C.

Rules of Evidence and Procedure Followed by Examiner.

Objections by any counsel inure to the benefit of all Respondents (Stipulation—Tr. 341). Respondents have an exception to every adverse ruling (Tr. 10651).

Writings on exhibits are not to be considered as received in evidence unless specifically identified (Tr. 3944-5; 6986). Conclusions contained in exhibits are not to be considered as received in evidence (Tr. 2302). Statements attributed to third parties in exhibits will not be considered as received in evidence (Tr. 6520-2).

No exhibit shall be held to apply to a particular respondent unless the entire record connects that Respondent with the transaction (Tr. 8107). No evidence shall be considered against any particular respondent unless that respondent be connected therewith from the entire record (Tr. 19848-9).

The Commission takes judicial notice of "The white book", Senate Document No. 71, a report of the Federal Trade Commission on "Competitive conditions in the cement industry" (The Examiner—Tr. 19674; 19724-5).

Each Respondent will be presumed innocent of the charges until the contrary is proven by evidence (Examines—Tr. 38671).

Exceptions to Omissions and Failures to Find Essential Facts Pertaining to Marquette.

8. For that the Examiner, beginning on page 6 of his Report, under the title of "Parties," devoted a series of separate sections to each of the individual respondents, and on page 18, in section 41, made specific reference to the respondent Marquette Cement Manufacturing Company, and on page 9 of the said Report, as a footnote to the paragraph applying to the Aetna Portland Cement Company, set forth,

"Citations following the identifying paragraph of each respondent refer to some evidence connecting the particular respondent with the policies and practices of the industry and the Institute as hereinafter reported in detail. Meetings connected with the Institute or the Code are not included."

and at the end of the aforesaid series of sections applying to individual respondents, on page 29, in Section 82, the Examiner set forth the following improper conclusions which are specifically excepted to and which are as follows:

"The foregoing individual references to particular respondents contain some of the facts which go to identify each with the activities of the Institute, and with other group activities. Additional references to those respondents and further details of their activities will appear throughout the remainder of the report. Because of the mass of material produced and received for these studies, it is not practicable to refer to all material on a given subject. Throughout this report sufficient references, only, are given to furnish bases for findings which your Examiner deems abundantly supported by the weight of the evidence contained in the entire record."

Further exception is taken to the Examiner's report in that thereafter he treats the evidence as to all respondents collectively, referring to the several respondents from time to time by the collective terms "Respondents," or "Producers", so that by the means aforesaid the respondent Marquette has been deprived of the benefit of its separate and individual defense, and though the record does not contain evidence which as to the respondent Marquette supports the charges of the complaint, the Examiner has failed to find and set forth in understandable sequence

essential facts pertaining to Marquette which constitute all the essential evidence pertaining to Marquette, whereas the Examiner should have found such facts as follows:

The Industry.

(See Paragraph Three of Complaint.)

A. Nature of the Commodity Involved.

Cement is a construction material, utilized as a constituent in the fabrication of concrete blocks, tile and similar products, and as a raw material for the purpose of making concrete for construction of buildings, foundations, roads, bridges, dams and other monumental works (Tr. 9986). It is in competition with numerous other construction materials which are used instead of cement (Tr. 47555).

For the purpose of this case standard Portland cement only is involved, and whenever the term "cement" is used, unless otherwise qualified, it refers to standard Portland cement. (Tr. 40115-19, 36727-8, 42230).

Cement as it is considered in this case is "delivered cement," which means standard Portland cement sold and delivered to the buyer at some destination specified by the buyer, apart from and other than the seller's mill. It also includes standard Portland cement which is purchased by the United States Government on the basis of the cost to the Government at the buyer's destination, but which is occasionally priced and invoiced f.o.b. mill solely for the purpose of aiding the Government in making a saving in the cost of transportation from the mill to destination when it can be shipped, over a so-called land grant railroad on a government bill of lading, or on the other rare occasions when means of transportation other than by railroad is desired by the buyer.

Cement is a standard commodity, made in standardized specifications, considered by buyers as not differing substantially among producers in quality except as between recognized and standardized grades thereof (The Complaint, Par. Three; Tr. 1737, 5470, 10324, 11731, 22775-880).

It belongs to the class of heavy goods, the carriage charges of which constitute a substantial part of the cost to the customer (The Complaint, Par. Three). Most cement is transported by public carriers whose rates are regulated by law.

B. Production, Consumption and Value of the Product During the Period Subsequent to 1920.

Production of cement in the years from 1928 to 1932 showed a decline of 54%. Persons employed in the industry declined from 34244 in 1928 to 11941 in February, 1933, a decline of 68.8%. (Hugh S. Johnson, Administrator, N.R.A., Commission's Exhibit 557.)

In 1928 production reached its peak at 176,298,846 barrels. In 1933 production was 64,000,000 barrels. In 1936 production had increased to 112,396,000 barrels and shipments to 112,566,000 barrels. These quantities were above the 100,000,000 barrel mark for the first time since 1931 and represented a gain of 46% in production and 50% in shipments over 1935. Prices generally in 1936 as compared to 1935 were unchanged (Commission's Exhibit No. 3).

The demand for cement varies and fluctuates from time to time and from place to place (Tr. 26593, 35476, 37196, 40032-3, 13597).

The recent trend of production has been strongly upward (Complaint, Paragraph Three).

The consumption of cement has been greater during recent years than it has been during depression years; sales and production rose with the 1932 price raise (Tr. 34930).

The cement industry is one involving large investments and large overhead costs. The greater the production of any one mill, the lower its overhead cost per unit will be (Tr. 22953-5).

(See Paragraph One of Complaint.)

Description of Respondent Marquette Organization.

Marquette was organized in 1898, its plant being at Oglesby, Ill. There is there also a plant of Lehigh Portland Cement Company and a plant of Alpha Portland Cement Company at La Salle (Tr. 13962, 39974).

Marquette has two manufacturing plants, one at Oglesby, Illinois which is so close to La Salle, Illinois that it is commonly referred to as the La Salle Plant, and one at Marquette, Mo., so close to Cape Girardeau, Missouri that it is commonly referred to as the Cape Girardeau Plant (Tr. 14039, 39974). Marquette acquired the Cape Girardeau Mill a little more than ten years ago (Tr. 13963).

Capacity of Mills.

The capacity of the La Salle Mill is approximately 5,000,000 barrels a year, and of the Cape Girardeau Mill approximately 1,600,000 barrels (Tr. 13963). The combined capacity of the two mills in 1932 was approximately 6,600,000 barrels (Tr. 14019). The term "capacity" as here used is the amount of cement that Marquette could make in one full year's time, running to capacity every day in the year (Tr. 14019, 14033). In order to run the plants at that rate it would be necessary to know in advance as to the possibility of shipping the total output of 6,600,000 barrels. It would not be possible to do it by starting in mid year. The program would have to be started at the first of the year and then work would have to proceed at top capacity speed (Tr. 14055-8).

(See Paragraph Two of Complaint.)

Respondent's Commerce.

Marquette is engaged in manufacturing, selling and distributing *delivered cement* (Tr. 39034) in interstate commerce at wholesale, principally through retail building dealers scattered throughout its sales area (Tr. 39038-9-40).

Respondent's Marketing Area.

Marquette sells and offers for sale *delivered cement* in part of the Mississippi Valley. It does not sell or offer to sell its product in any seaboard area in competition with cement imported from foreign countries (Tr. 39037, 6534 to 6543 inclusive). It does not sell its product generally in the State of Michigan (Tr. 39041, 39989, 460, 516-17, 687, 955).

Marketing Methods.

(Complaint Paragraph Five.)

The Dealer.

By far the greatest part of Marquette's output has been marketed year by year through retail dealers, who have formed an essential means of marketing and distributing

Marquette's products, stimulating the use thereof in competition with other articles of trade that might otherwise be subsituted therefor, assuming the burden of local credit, thus reducing the business risk, and decreasing the amount of working capital required by Marquette in the operations of its business, and at all times until December, 1939, relieving Marquette from the necessity of tying up large sums of working capital through the prepayment of freight on shipments of cement (Tr. 39038 and 9, 39971, 2, Resp. Ex. 45).

The dealer performs special services in merchandising of the product. (Statement of Examiner, Rec. 32187-9, 12047, 12050.)

The dealer business is the backbone of the cement manufacturers' distribution. (Statement by Mr. Paulson and by the Examiner. Rec. 28570-1; see also Tr. 12048-52.) There is no evidence to the contrary. The main and substantial part of the manufacturer's business is through the dealers; the business through the dealer is diversified business and is more substantial for that reason. It goes through many small sources and does not subject the manufacturer to violent reactions in the matter of quantity as between one year and another. (Statement by the Examiner, Rec. 28572.)

Under the temporary government relief program to increase employment (Tr. 2277, 12053), the Government through its agencies began handling the same type of work formerly handled by contractors who would in normal times have purchased their cement from dealers (Tr. 12057, 12132). Dealers believed they were entitled to handle such sales and objected to direct purchasing from manufacturers by these temporary relief agencies of the U. S. Government (Tr. 12017-8, 12060-3, 12072, 12102, 12133).

Marquette has always pursued the policy of affording its dealers full protection (Tr. 25040, Resp. Ex. 2991).

Location of Market.

The market for cement is at the buyer's destination. (Frye-U. S. Purchasing Agent Tr. 181, 201, 202, 203, 230-1; Taylor, 1307, 1316, 1325; Rice-U. S. War Department, Tr. 1768-1782, 1806; Hayghe-U. S. Procurement Office, Tr. 1825-6; Ashley-Department of Agriculture, Tr.

5457-9; Peoples-Chief U. S. Procurement Division, Tr. 10307, 10310, 10425-6, 10455-6; Hamlin-State of Illinois-Purchasing Department, Tr. 11834; Wecker, Tr. 14014; Custer-Navy Department, Tr. 21306.) There is a market price for delivered cement at all destinations (Tr. 11834).

Marquette Equalizes Prices to Buyers in Area Where They Are Competing With One Another.

Frequently, buyers, located in an area where they are competing one against another, are at different distances, transportation-cost-wise, from the mill from which they all may be buying cement at a given time. In such a case, Marquette follows the established custom and sells its delivered product to all such private buyers at an equal, or the same, price to all. It is the usual custom to equalize the price of the delivered product to buyers located in an area where they are competing one against another thus avoiding discrimination (Tr. 6733-4, 7085, 13522-3 26824, 27136, 27138, 32093, 42435-6).

Respondents Compete in Same Markets.

Friendly dealers offer the mills from whom they buy a chance to meet lower quotation (see Statement by Wooden Tr. 39, 231-2; Tr. 37328, 37690, 42015, 37121, 42297, 40063). Despite this source of information, respondents must be on the alert since the initiator of a price reduction will have salesmen taking business on the strength of the lowered prices (Tr. 42014).

There is no mutual understanding or agreement between respondent, Marquette, and any other producing respondent to quote and charge the prevailing market price or any particular price for any cement at any particular location (Tr. 14004, 39996-7).

When a going market price is established at any particular destination, delivered cement is offered by all producing respondents competing for business at such destination at this market price until someone of the respondents assumes leadership in raising or lowering the going market price at such destination or at nearby destinations in the same area of competition.

So soon as any change in quotations becomes known to private dealers and contractors in any area where they

are competing one against another, they inform the mill or mills from whom they seek prices for the delivered product and, if such change is a reduction in price, it is promptly met by other mills competing for business in such area. If such change is an increase in price, there may be a lag for a period of time before other mills follow it and if it is not followed within a reasonable time, the mill that has taken the lead in making such increase must again reduce its price for the delivered product in the trade area where such price increase has been quoted (Tr. 6109).

The establishment of new mills and the making of prices around mills has forced competitors to withdraw from former trades areas and to restrict the area in which they do business (Tr. 27297, 27979, 29586, 30590, 31187, 38934, 26679, 32636, 42189).

In every area where Marquette seeks to sell its delivered product at wholesale, other manufacturers of cement also seek to sell their delivered cement (Statement by Commission Counsel, Tr. 32081, 35776). Representatives of such mills are constantly calling on the trade to secure business for their respective companies. Marquette and other producing respondents in its trade area constantly seek to establish and maintain good will with dealers and other private buyers by prompt and efficient delivery, satisfactory handling of claims for loss and shortages, prompt allowances and reimbursement for return of bags by various special services and the like (Statement Counsel, Tr. 32082). The consumption for cement in any given locality or trade area depends upon the volume of construction in which cement is used as an ingredient in the construction of buildings, roads and other works wherein cement is commonly used. Marquette's volume of sales does not depend directly upon the price at which it offers cement at wholesale at any particular time (Tr. 37196-7, 26593).

Anatomy of Cement Prices.

To every prospective buyer of cement "Price" means the cost to the buyer of "delivered-cement" at the buyers point of use. (See record references at end of next paragraph).

The cost of transporting cement to the buyer's destination is an element of cost which enters into the price made

by the seller for its product delivered at the buyer's destination (Callaghan-Dealer Tr. 7709, State and Gov't representatives Tr. 11681, 1321-2). It is usually purchased from the mills in carload lots, freight costs per barrel being less on such lots (Tr. 9441, 9461-2). Buyers of cement in wholesale quantities purchase it solely on the basis of the total cost of the product at the buyer's destination (Tr. 202, 7709, 7937, 230, 11834, 184, 184, 1255, 1307, 1316, 1734, 1768, 8247-8, 28049, 32139-41, 32674, 36733-4, 36889, 42527, 42277-8, 1806, 1825, 9473, 10052, 10307-10).

The terms "Price," "Price Quotations," "Delivered Costs," "Destination Costs," "Destination Prices," refer to and include transactions between manufacturers selling at wholesale and wholesale buyers, such as dealers, contractors, railroads and governmental agencies, federal, state and municipal. As between buyers and sellers, all of the foregoing items are synonymous and refer to the cost of the *delivered cement* at the buyer's destination (Tr. 202, 32139-41, 8247-8, 36733-4, 36889).

Marquette's Marketing Methods.

Sells Delivered Cement.

Delivered Prices Are An Established Custom.

Marquette's product has been sold as *delivered cement*. Marquette sells cement as a delivered product priced at the buyers' destination because that is the way buyers want it. The kind of prices quoted by the Respondent Marquette and at which it sells its product are explained by and result from the nature of the product, the railroad freight rate structure and the needs and requirements of its customers. (See various citations in subsequent paragraphs in this section.)

Marquette's method of pricing its product at the buyer's destination is commonly referred to as selling at delivered prices. Such prices have been the custom in the industry for more than twenty-six years (Tr. 32649 through 32656, 36878, 38626-9, 26424, 26613, 26627), and it is what the buyers demand. The dealers desire delivered prices (Duffy—Dealer, Tr. 7937; Dain—Dealer, Tr. 8032-3). Contractors prefer delivered prices (Tr. 11731, 8247-8, 9474); (so well established as a custom that examiner

refused to admit exhibits showing demand by contractors for delivered prices, Tr. 30531, 30535, 38856-7). State purchasing agents desire it (Tr. 11677). State of Indiana purchasing agents desire delivered prices (Tr. 11800-1). Except where there is a saving by land grant rates, the United States Government prefers to buy delivered cement at a delivered price. Peoples, United States Procurement Division, Tr. 10458, Fry, Dept. of Interior, Tr. 230.) Most buyers cannot figure out transportation rates from complicated railroad tariffs. (Simpson, testifying as rate expert for Interstate Commerce Commission, Tr. 9469, 9487-8, 9512; Blom, Iowa State purchasing agent, Tr. 11676-7.) By buying *delivered cement* the buyer saves the expense and trouble of figuring freight rates (Tr. 11731, 9530). Delivered prices are requested by customers (abundant evidence to that effect—statements by examiner, Tr. 32140-1, 42277-8). (Hartley, manager of the state owned South Dakota plant, testified that his customers insist on delivered prices (Tr. 12772).)

Generally Marquette has not received requests to sell its product otherwise than as *delivered cement* (Tr. 39034). Occasionally Marquette has been requested to submit prices to agencies of the United States Government f.o.b. mill where land-grant rates or water deliveries would give the government the benefit of a saving in the cost of the product delivered at the government destinations (Tr. 39034-5), and in many such instances Marquette has furnished such prices, and in many instances it has sold and delivered large quantities of cement to the United States Government as so requested, thus affording to the United States Government savings in the cost of transportation of cement to the government destinations, either by land-grant rail rates, or by water carrier (Tr. 39034-5, 39052).

Marquette owns and operates some barge equipment in which it delivers bulk cement to some of its customers and to silos or warehouses in St. Louis and Memphis from its plant at Cape Girardeau, Missouri (Tr. 13963).

Occasionally Marquette delivers cement in its own barges, propelled by its own towboats, to serve jobs which it has sold, to points along the Mississippi, Ohio and Tennessee Rivers. It has not in this manner delivered as far as Cincinnati, Louisville or Evansville. It has gone down the Mississippi half way to its terminals to deliver cement by water. There have been no water deliveries possible

from the LaSalle plant without an intervening rail haul. There have been deliveries made occasionally to job sites on jobs sold from the LaSalle Plant by water. Some cement has been delivered in Chicago by barge and rail to a specific job, but no deliveries are made in Chicago to the dealer trade for warehouse storage by this means (Tr. 13963-4-5-6).

Marquette also has made and offered to make delivery of its product to customers, principally the United States governmental agencies, by combination of railroad and barge lines (Tr. 13965-6 and see for illustrative examples Com. Exs. 793, 795, 791, 780; 777 A-B, 771, 772, 769).

Wherever the United States Government has been able to make a saving by cheaper water transportation, Marquette has bid f.o.b. government barges at its mill at Cape Girardeau on the Mississippi River, thus enabling the United States Government to take advantage of water transportation. (See the following illustrative examples, which are abstracts of government lettings from 1927 through 1936 (Com. Ex. 796, 795, 794, 793, 791, 790, 788, 786, 785, 783, 780, 777 A-B, 772, 771, 769, 397, 398 A-B, C, through E, 182, 184-H).

Marquette has no true price at its mill; except that it quotes an f.o.b. mill price to the U. S. Government when it requests it (Tr. 14011, 390,34-5).

Commission's Exhibit 184-H indictes that Marquette not only bid f.o.b. cars its mill when requested by the United States Government, but on its own initiative, without invitation, as early as June 12, 1928 pioneered in digging out and offering to the Government convenient and possibly money-saving methods of transporting cement from mill to government destination. It appears from this Commission's Exhibit that Marquette "submitted the bid from the American Barge Line Company of Louisville, Kentucky, to haul the cement for 10½ per hundred pounds from the mill to Greenville, Mississippi." It is further stated that Marquette submitted a letter stating their price would be the same f.o.b. barge as f.o.b. car, their plant, and that the bid was irregular on the water delivery part, as the government asked for rail delivery and the purchasing agent did not know what action would be taken on the matter in Washington.

Thereafter the United States purchasing agents began asking in rather crude fashion for f.o.b. barge bids where

such mode of transportation was applicable. (See Com. Ex. 769.)

Commissioner's Exhibit 769, which is the abstract of bids to the United States Government for 60,000 barrels for use at Vicksburg, Mississippi, to be let on July 26, 1928, shows that Marquette not only bid f.o.b. barges at its mill, but out of the 13 producers that bid it was the only one that furnished information as to towing costs.

Unless there is a land grant rate saving involved in United States Government purchases, there is no need for an f.o.b. mill price (Tr. 214, 230, 1803-4).

When an f.o.b. mill price, plus the land grant rate to the destination is the same as the destination price on commercial freight rates, the government would rather accept the destination price on commercial rates and save itself the expense and trouble of shipping on government bills of lading (Tr. 10456-8, Com. Ex. 171 A through C).

Marquette has not agreed with, combined with or in any manner cooperated or collaborated with any other manufacturer or dealer to employ any particular method or practice of marketing or selling cement (Tr. 39051-52, 14003, 14007).

The respondent Marquette has not been a party to any mutual understanding or agreement with any other respondent in pursuance of any combination or conspiracy or otherwise to cooperatively or otherwise employ the so-called "Multiple Basing-Point System of Pricing" or any other particular system of pricing cement (Tr. 39051-2).

Marquette does not employ the so-called "basing-point" system (Tr. 14012, 14042, 39962) of pricing.

Marquette Makes Independent Prices.

Marquette has at all times independently made its own prices for its product (Tr. 14004, 39052). Marquette has been at all times free to raise or lower such prices or quote such prices for its products as it saw fit, without any agreement, combination or understanding with any other respondent (Tr. 30951-2).

Marquette has intentionally underbid competitors in order to get business (Tr. 14005-6), and Marquette's prices have at times been lower than those of competitors (Tr. 14007-8). This practice has never ceased at any time, save it was limited somewhat by the Code (Tr. 14076-7).

The independence of Marquette in its activities has fairly earned the reputation of being a price cutter, of underselling the market price, and of being a most aggressive and destructive competitor (Tr. 12046-9, 12393, 12413, 12703, 14343, 19640, 24587-8, 25869, 32763, 33236-8, 32754-5, 36477, 36612, 36695-9).

As the result of the independence of Marquette in quoting and selling its product its prices have not been identical with those of its competitors, except when Marquette has met the prices which it has found its competitors quoting in any field where its competitors have had the advantages over Marquette in the cost of delivering their product to the destination, and except where Marquette's competitors have ascertained and met the prices set by Marquette in the portion of its marketing area where Marquette enjoys an advantage over competitors in the cost of transportation (Tr. 39052-3).

Marquette has found that to do any business it must have a price at least as low as its competitors and Marquette frequently makes prices lower than its competitors (Tr. 14083-6).

Marquette makes its destination prices by taking the mill nets that it wants to get and adding to it the freight to the various destinations. However, Marquette runs into cases where other companies quote a delivered price less than the one Marquette has computed, and in that case Marquette has to meet the delivered price of competitor (Tr. 39962-3). Pursuing its policy of independence, Marquette has at all times made its own prices and has quoted and sold at prices lower than its competitors (Tr. 14083-6). This has earned to Marquette the reputation of being a price cutter (Tr. 39046-50). Marquette does not care if its competitors learn of the lower prices as quoted, after Marquette sells the job (Tr. 39988).

Marquette has never refrained from reducing its prices in any territory, including the territory from which it would receive its highest mill net (Tr. 14076). Marquette has never reciprocally or otherwise, or pursuant to collusion or agreement or combination, refrained from price competition. Marquette has always been free to make and has made its own prices (Tr. 14004, 39996-7).

Marquette has both raised and lowered its prices in its general area around its mill. In so doing it has found price competition from competitors. Marquette endeav-

ored to raise its price in May, 1937, around one of its mills. Marquette's competitors refused to follow this price increase, and Marquette was compelled within a few days to reduce its delivered price to meet the competition it found in the field (Tr. 39040-50, 38701, 24640-3). Many times price advances attempted by one company have not been met by competitors, with the result that the company attempting to increase its prices has been compelled to again reduce its prices, if it intends and wants to get any business (Tr. 881-2, 8159-60; Resp. Ex. 1996, 1992-1999-H; Tr. 195040, 28774, 30041, 30049, 30050, 30090, 31238, 32280, 35637, 36896, 37306-7, 38701, 37506, 40056, 42250, 42013, 6263, 6264).

Marquette has always made its own prices (Tr. 14004), and has determined them from the standpoint of demand of its product in various marketing areas, with due regard to the amount it believed its customers would be willing to pay, when its sales efforts were aided by the persuasive ability of its salesmen, and also with due regard to the price it would have to receive in order to pay for the operation of its business, and if possible to end the year not with a loss, but with a profit (Tr. 39046). For example, in 1932, after quoting to the State of Illinois prices considerably lower than Marquette's regular going quotations, and getting a substantial tonnage (2,500,000 bbls.) and selling all the cement it could make for that year, Marquette "about went bankrupt"; it lost over a million dollars in 1932. Cement prices and consumption of cement declined very substantially during 1930, 1931 and 1932, the time of the depression. The low point in prices was reached and a general upswing or price rise began in the spring of 1932. Marquette decided to get more money in 1933 for its cement, shipping a lesser tonnage in order to stay in business and accordingly in July 1932 Marquette broadcast quotations raising its prices (Tr. 39049, 39966-88, 39997, 4000). Competitors did not follow these increased prices in all markets, and Marquette had to make certain reductions (Resp. Ex. 85, Rec. 14019-20).

Marquette had no money to lose in 1933 (Tr. 40004) and stuck by its going quotations on its bid to the State of Illinois (Tr. 39969). Nevertheless, when offered an order for millions of barrels, Marquette negotiated a contract with the State of Illinois in June, 1933, at a price lower than the bids made by any cement companies at the letting (Tr.

39951, 40013; 25867, 39988-9, 14050-5, Com. Ex. 1898). As a result of this sale to the State of Illinois, Marquette had sold as much cement for the year 1933 as it could manufacture; its plant ran as full as it could for the rest of the year (Pr. 39998). Then Marquette sent out announcements to its dealer trade raising its quotations of delivered prices (Tr. 39049).

Leads and Lags in Price Changes.

Price Changes Do Not Become Immediately Effective.

Private buyers as distinguished from governmental bodies include dealers and contractors. During the periods of price changes or of attempted price changes there will be variations in price quotations amongst competitors for delivered cement (Resp. Ex. 85) (Tr. 37370) (Com. Ex. 2268-69-70, 2286, 2293, 2310, 2297, 2311) (Tr. 47147, 33445) (Com. Ex. 1121-M, 1121-K, 1121-J). (Resp. Ex. 2506-A, B, 3648, 3649) (Tr. 47127-8, 12703, 12716, 39049-50, 24641, 19540, 881, 882, 6263, 6264, 8159, 8160) (Resp. Ex. 1996, 1992 through 1999-H) (Tr. 19540, 28774, 30041, 30049, 30050, 30090, 31238, 32280) (Resp. 533) (Tr. 35637, 26896, 37306-7; 38701, 37506, 40056, 42250 42013). After a period of time there is an adjustment by the withdrawal or a modification of a lead or a lag by the sellers, which once again establishes a basis of equality in price to all those buyers in the same competitive area, that is to say, the area in which such buyers are competing with one another (Resp. Ex. 85) (Tr. 6109, 14019, 14020). Such is not peculiar to cement but occurs with other materials (Tr. 7856, 10324). Resale prices of dealers, over which manufacturers have no control (Tr. 12068), act in a similar manner (Tr. 7931-7).

In addition to the variations between competitors which occur at the time of price changes, there is constant cutting of price to contractors and dealers by various competitors, which results in variations in prices (Tr. 6241-2; 11335-6-7, 11342-3; 11353-4; 13045; 13296-7; 19622-4).

(Complaint Paragraph Six).

Competition on Government Lettings.

A. Identical Bids Not Collusive.

Marquette Bids Frequently Not Identical.

The Fort Peck letting by the U. S. Government of June 5, 1934 occurred during the Code period. In compliance with the Code a special price to the government on this letting had been filed with the Code Authority and Marquette had been advised by the Code Authority of this Price (Com. Ex. 164-J). Marquette's bid on this letting was made to meet the filed price (Tr. 39043).

The lettings of June 5, 1934 and October 18, 1935 are the only two examples listed in the complaint in which Marquette took part. As to the first one Marquette in its Answer denied that it was a typical or illustrative example of identical or uniform delivered prices under any certain method of pricing (see Marquette's Answer page 5, paragraph 6) and this the evidence bears out. As to the second, Marquette in its Answer denied that the bids were identical as alleged in the Complaint (Marquette's Answer, page 6) and there is no evidence to the contrary in the record. Commission Counsel did not introduce any exhibit in evidence to sustain this allegation. During these same two years, 1934 and 1935, awards were made to Marquette on U. S. Government lettings f.o.b. mill on the basis of Marquette being the lolwest bidder (Com. Ex. 793 and Com. Ex. 795). Marquette has also received awards on U. S. Government lettings on the basis of Marquette being the lowest bidder during 1936 and for each year for seven years prior to 1934 (Com. Ex. 796, 790, 791, 788, 787, 786, 785, 783, 777-A, B, 771, 769, 766), in each of which instances Marquette bid and sold f.o.b. its mill.

State and federal government specifically provide in their invitations for bids that they will never be required to pay more for cement than private buyers. They contain "price-decline" clauses (Iowa-Com. Ex. 1847-C, 1852-C, 1855UU, Indiana-Com. Ex. 1859-J; Illinois-Com. Ex. 1881, 1885, 1889; Wisconsin-Rec. 12182; Louisiana Rec. 12816; Com. Ex. 2157-U) (Resp. Ex. 947-D; 955-D—

Federal invitations). Identical bids made no difference to the states since they were always sure of getting cement at the lowest market price through operation of these "price decline" clauses; the U. S. Government never paid more than the prevailing market price (Tr. 10366).

The identity or nonidentity of bids has no relation or connection with the Government obtaining lower prices than other users of cement (Tr. 10471). Submitting bids on subsequent lettings at lower prices than the prices on previous lettings will inevitably result in selling at a loss (Peoples, Procurement Division, Tr. 10473).

The U. S. Government received nonidentical bids before, during, and after the N. R. A. Code (Tr. 1244-5; see also, supra, awards made to Marquette because lowest bidder).

The terms of sale offered by bidders are always considered by governmental [redacted] making awards (Tr. 5466, 1121-2, 1163-6, 21307-[redacted] 1825-6); e. g. awards are made on the basis of [redacted] offered (Com. Ex. 171 A-C) on the basis of one bidder offering to pay freight charges on returned sacks (Com. Ex. 193). The responsibility of the bidder is also considered by the government (Com. Ex. 778, 790).

Marquette has made lower prices to governmental bodies than to its dealers (Tr. 14009, 14025 and 14028).

B. Conduct of Governmental Purchasing Agents Has Encouraged Identical Bids.

The U. S. government agencies have not followed a uniform practice in making awards. In some instances awards have been made to the closest plant on the basis of getting better service (Tr. 1322-3); in some instances the award has been made to the mill located farthest from the destination in question, to the mill which realizes the smallest mill net on the shipment (Tr. 188, 199). The states in taking invitations have required bidders to submit bids on all the destinations involved in the letting, with instructions to the bidders not to limit their bids to the localities around their mill, under penalty of either having their bids thrown out or not being considered (Com. Ex. 2443-C, 2457-D).

The Indiana State Highway Commission received bids December 17, 1931 on 2,000,000 bbls. of cement. The bids were not identical, but all bids were rejected (Com. Ex.

1864; Rec. 11778 through 80). (Com. Ex. 1863 covers the second proposal and letting for 1932 cement for the State of Indiana; Tr. 11779, 11780). Marquette bid on this letting of January 24, 1932 for the state of Indiana on the total 2,000,000 requested by the state. Marquette bid at each of the 90 destinations listed by the state. Marquette's prices at 57 of the destinations were lower than the prices submitted by any other bidder (Com. Ex. 1863). The Indiana State Dept. considered it best to purchase at delivered prices (Tr. 11801). Lone Star was not low at any destination and yet received an award on this letting in excess of any award to any other bidder (Tr. 11809, 11799). After these bids were received, the Indiana State Highway Commission permitted some of the companies with plants in Indiana to file revised quotations based upon the lowest prices that had been received. The result was that the state had identical bids again and permitted all bidders to equalize their prices. The state then made awards to those that had been permitted to meet the lower price bid by Marquette thus making their bids identical (Tr. 11809). Although Marquette had submitted the lowest bids on over a majority of the destinations listed and had offered to sell 2,000,000 barrels to the state and although the state made an award for 1,800,000 bbls., Marquette received an award of only 200,000 bbls. (Tr. 11799 to 11,821, inc.).

Com. Ex. 1875 A, B is a tabulation for cement to be furnished in the year 1931 to the Indiana Highway Commission (Tr. 11781-2). On the back of 1875 will be found the adjusting prices of the bidders (Tr. 11785-6). The original bids shown on the face of Com. Ex. 1875 were not identical, but after adjustment, as shown on the back of 1875, as submitted by the State of Indiana Highway Com. all bids were identical.

The State of Wisconsin in the year 1931, permitted five bidders to revise their bids downward to meet the competition of a low bidder and equalize the low bid, after the state had first taken bids and rejected them and taken a second set of bids (Tr. 12161-7).

The State of Louisiana received bids on August 19, 1929. There was variation amongst the bids submitted on this letting. Lone Star's bid was uniformly low for each destination. Contracts were given not only to Lone Star but also to five other companies at identical prices for each destination (Com. Ex. 2451) (Tr. 13806-7). The state

commission followed no set policy in making awards (Rec. 13813).

The State of Missouri received bids January 20, 1931 (Com. Ex. 2439). There was considerable variation between the bids submitted on this letting (Com. Ex. 2439). Marquette was low at some points on this letting (Tr. 13788-90). These bids were all rejected and new bids taken March 5, 1931 (Com. Ex. 2440). The Missouri Highway Department permitted Marquette and others to meet the low prices of Missouri-Portland filed with the Missouri Highway Dept. after the bids were opened (Tr. 37372). On this Missouri Highway Dept. letting of March, 1931 (Com. Ex. 2440), Missouri Portland Cement Company bid prices lower than their current market prices. Its bid prices were the lowest for most destinations. The Missouri Highway Commission permitted Missouri Portland's competitors to meet these low prices. These low prices did not increase Missouri-Portland's tonnage; Missouri-Portland received about the same percentage of the total award as it had in previous years (Tr. 37291-292).

On the Missouri Highway letting of October, 1931 (Com. Ex. 2441), Missouri Portland bid substantially less than their current market prices, and was low bidder at all destinations but probably three or four, out of more than a hundred. The Missouri Highway Dept. did not make an award to Missouri-Portland on all of the cement on which it was low bidder. It again permitted Missouri-Portland's competitors to meet Missouri-Portland's prices on a substantial part of the business on which Missouri-Portland was low bidder (Tr. 37293-4).

The U. S. Government in its invitations to bid invites bidders to equalize freight rates (Tr. 1822-3, 2453) (Com. Ex. 171-G).

Subsequent to such experiences Marquette in bidding or quoting prices for delivered cement to governmental agencies generally used the current wholesale prices at the destinations to which the cement was to be delivered, but with certain outstanding exceptions in that (a) it continued to give the U. S. government the advantage of savings that might be realized where land grant rates applied by quoting and selling f.o.b. mill and allowing shipment on government bills of lading (Com. Ex. 766 A-D, 767, 182, 183, 769, 772, 770, 771, 774, 773, 185 A, 776, 775, 777 A-B, 778 A-B, 779, 398 A-E, 184 H, 780, 781, 782, 783, 784, 785, 786, 787, 788, 187 A, 188 E, 789, 790, 791, 397,

792 A-B, 794, 192, 793, 795, 796; Tr. 3505-43; Resp. Ex. 47, Tr. 10441-2); (b) also it continued to give the government advantage of savings by barge shipment and by combination of water and rail (Com. Ex. 796, 795, 794, 793, 791, 790, 788, 786, 785, 783, 777 A-B, 772, 771, 769, 397, 398 A-E, 182, 184 H, 780; Tr. 13965-6); (c) Marquette continued to quote and sell at lower than the current wholesale market price for delivered cement in cases where it was afforded the opportunity to bargain independently with the buyers (Example of this is shown by Marquette's deal with the State of Illinois in 1933 Tr. 39951, 40013, 14050-5, Com. Ex. 1898; and with the State of Wisconsin, Tr. 12149).

Where governmental agencies have entered into private negotiations and bargaining with private bidders the governmental agencies have made savings and obtained better prices (Com. Ex. 329 A-Z). (Tr. 40013, 1703, 2340, 2646, and 11093, 1742-3, 6407-8).

(Complaint Paragraph Seven.)

(a) Institute Freight Rate Books Never Used by Marquette.

Marquette has been making its own freight rate books for 25 years; Com. Ex. 2609 is a typical Marquette freight rate book. (Tr. 14074-5, 4059) Marquette's freight rate book is made up from the published tariffs of the different railroads. It shows freight rates to all destination points where Marquette wants to sell cement, and also shows all of the different mills with which Marquette is likely to compete (Tr. 14034). Marquette does not check or compare its freight rate books with the freight rate books of the Cement Institute and has never used the Cement Institute freight rate books (Tr. 14035) (Resp. Ex. 92). Marquette does not use the Cement Institute freight rate books and has no agreement or understanding with any other cement manufacturer or with the Cement Institute or any one else concerning freight rates or freight rate books (Tr. 39051-2).

The figuring of freight rates is complicated. Nobody can check a freight rate quickly and easily. It would be impossible for any dealer who had not made a study of freight tariffs to check the freight rates himself (Tr. 9469). The figuring of freight rates is a matter for an expert (Tr. 9510). The dropping of fractions in figuring freight rates is an old practice followed by the Interstate Commerce

Commission and the railroads as a general statistical rule (Tr. 19323, 9893, 38211, 38212, 41484, 9885-6). Bidders on government business must know the cost of shipment in order to make their bids attractive (Tr. 1321). There are freight rate bureaus or agencies that furnish freight rate information for fees (Tr. 9490). The services of claim adjusters rechecking freight rates and bills is essential to the economical operation of all business that pays freight charges (Tr. 9512). The U. S. government has a force of over 200 auditors in the general accounting office, 100 in the War Department and a number in other places doing this work (Tr. 9511). There are billions of tariff rates, rules and regulations that would apply to the shipment of portland cement (Tr. 19325).

By buying "delivered cement" the buyer saves the expense and bother of figuring freight rates (Tr. 11731, 9530).

Marquette's freight rate books merely compile in usable form the official published tariff rates which apply to the movements of portland cement to destinations in which Marquette is interested (Tr. 14034, Com. Ex. 2609).

(b) Marquette Has Not Cooperated to Prevent Truck Deliveries.

There have been very, very little deliveries of cement by truck from Marquette's mills. There was no time when there was more trucking than at another time. Marquette has always been opposed to the idea of having trucks running around its yards (Tr. 13966-7). (Commission's Exhibit 1043-0, 1731, which should be dated 1932 instead of 1931—Tr. 40924-5.) (Com. Ex. 1496 A-C, 933-2S, 933-3C, 933-3D.)

Marquette opposed the establishment of short haul rates to meet truck competition (Com. Ex. 1731).

Marquette has not generally received requests to sell otherwise than at destination prices, except to the U. S. government from time to time, where land grant rates or water delivery might give the government a saving (Tr. 39034).

Marquette has not been a party to any agreement, understanding, concerted effort or cooperative action to prevent the delivery of cement on trucks, or the charging of an extra fee per bbl. for truck delivery, or in any other way

to interfere with or affect truck delivery of cement (Tr. 39051-2 and Tr. 39041-2).

(c) Marquette Has Not Cooperated to Prevent Diversions in Transit.

Marquette always refused to allow diversions of shipments. Marquette agreed in principle with the provisions of the N. R. A. Code declaring diversions unfair trade practice, but did not think it should be covered by the Code. Marquette did not collaborate or cooperate with anybody with regard to the matter of diversion (Tr. 40007-8, 39051-2). Marquette has always pursued the policy of affording its dealers full protection (Tr. 39040, Resp. Ex. 2991).

(d) Land Grant Rates Are Ascertainable by Respondents.

Marquette Has Not Thwarted the Efforts of Government to Obtain F.O B. Mill Prices.

An f.o.b. mill price bid may be in any one of several forms:

(a) a destination cost bid from which is to be deducted a specific allowance named by the bidder, e. g. (Commission's Exhibit 187-A, Tr. 1611; Commission's Exhibit 770; Respondents' Exhibit 1057 A-C;)

(b) destination cost bids from which is to be deducted either commercial freight, land grant rate or a special rate. (Tr. 1,745-6, Commission's Exhibit 157, Respondents' Exhibit 2,995 A-S.)

(c) quotation of price f.o.b. cars at mill (Respondents' Exhibit 45) or f.o.b. barge (Commission's Exhibit 793).

It has been Marquette's policy to sell the government as requested at all times (Tr. 39035-6).

In 1925 Marquette bid a price on delivered cement to the U. S. government as requested. After letting, in response to a request from the government, Marquette advised the government the amount they could subtract from the previously quoted destination price to arrive at an f.o.b. mill price for shipments from Marquette's plant (Com. Ex. 765 A-F).

Every year for ten years prior to the filing of the complaint in these proceedings, Marquette has, as requested

by the U. S. government, submitted f.o.b. mill bids. (Com. Ex. 766 A-D, 767, A, B, 182, 183, 769, 772, 770, 771, 774, 773, 185 A, 776, 775, 777 A-B, 778 A-B, 779, 398 A, B, C, thru E, 184-H, 780, 781, 782, 783, 784, 785, 786, 787, 788, 187 A, 188 E, 789, 790, 791, 397, 792 A, B, 794, 192, 793, 795, 796, Tr. 3505-43, Resp. Ex. 45.) In the nationwide letting of April 15, 1938 Marquette again submitted an f.o.b. mill bid (Resp. Ex. 45). The United States Director of Procurement in reference to this bid states that if all bids had been as responsive as Marquette's, the government's problem would have been solved (Tr. 10441-2).

Award on government lettings are and can only be made on the basis of the lowest destination cost to the government at the destination in question, and every buyer wants to know what the lowest delivered price is to him at the place that he wants to use the material (Tr. 181, 184, 202, 203, 230, 1307, 1316, 1321, 1734, 1768 to 82, 2453, 5457, 21306, 1825, 10455, 6, 1806, 11731). The lowest f.o.b. mill bid does not necessarily get the award (Tr. 5456-7, 1318). If there were no land grant or special rates, the government would not care about a shipping point or f.o.b. mill price (Tr. 214, 230, 1803).

Land grant freight rates were obtained from various sources:

(a) from the railroads (Tr. 42335-6, 6646, 47774-6, 21143, 1249-50, 226; Resp. Exs. 2246, 2247).

(b) from government invitations to bid (Com. Ex. 167-A to G).

(c) from government abstracts of bids (Com. Ex. 165, 182, 187, 765, 766, 767, 769, 770, 771, 772, 773, 777, 778, 779, 780, 781, 782, 783, 787, 788, 789, 790, 791, 792, 793).

(d) from computation by the bidders' traffic experts (Tr. 1241, 1250, 1291).

(e) from the Institute land grant rate service, which was discontinued January 28, 1937, after a short trial (Resp. Ex. 169).

Marquette Did Not Use a Control Clause as Means of Depriving Government of Benefit of Land Grant Rates.

The so-called control clause was filed by a competitor with the Code Authority during the Code days. Marquette learned of the control clause from the Code Authority in compliance with the provisions of the Code itself (Tr. 32724). If a bidder uses the land grant rate in figuring

its bid submitted with a control clause, the government is not deprived of the benefit of any cheaper freight rate available to it (Tr. 1240, 21089, 1731). The U. S. government has itself used a control clause, in substance and effect the same as the control clause used by the cement companies, and has requested bids on it on the basis of its use (Com. Ex. 793, 401, 794; Resp. Ex. 2995 A-S, 2918 A, Z-20; Com. Ex. 795; Resp. Ex. 1082-A-S; Com. Ex. 124 B, 170 B; Tr. 1263, 1273, 1296-7). Where bids using the control clause have been submitted to the government, the bids so submitted have been lower than the commercial price at the same destination (Tr. 1819; Com. Ex. 789; Resp. Ex. 820 to 830; Com. Ex. 157, 401).

During the Code days Marquette several times used what is known as the control clause in making bids to the U. S. government, whereby Marquette would permit the government to deduct the lowest land grant or special rate in order to get a figure at the mill. This was considered as the equivalent of bidding an f.o.b. mill quotation (Tr. 39977, 1745).

During the Code days the only price Marquette could quote was the price that was on file with the Code Authority. Marquette had on file a mill price for quoting to the U. S. government. If the Marquette filed mill price plus the lowest land grant or special rate that Marquette could find, was less than the destination cost price filed by someone for the particular letting, then Marquette quoted its mill price to the government, but where Marquette found that its mill price, plus the lowest freight, would be higher than the filed price, then Marquette used the filed destination cost price (Tr. 39979, 39980-81). In the case of Marquette, the use of the control clause always gave the government a better price than the one Marquette had filed f.o.b. mill (Tr. 39981). Marquette has at all times cooperated with and aided the U. S. government in obtaining the maximum benefit land-grant rates, and has not in any way thwarted or attempted to thwart the efforts of the United States government officials to secure f.o.b. mill prices (Tr. 39035-36; Resp. Ex. 19-K).

(e) (f) Marquette Did Not Cooperate With Other Respondents in Classification and Division of Customers Nor Enter Into Any Understanding to Limit Sales to Certain "Cement Dealers".

Marquette never at any time entered into any combination, agreement, conspiracy or arrangement, directly or indirectly, with any person, firm or corporation, for the adoption, retention or establishment of any provision in the so-called N. R. A. Code, or any other agreement or plan, establishing, requiring, or arranging in any manner any division or classes of customers or purchasers of portland cement or dividing such customers into classes of those who were to be sold cement direct, and those to whom cement producers would be prohibited from selling directly (Tr. 39036). Marquette opposed any inclusion in the Code of a provision for the classification of customers (Com. Ex. 2603, A-F, 2629). It has been Marquette's policy to afford dealers as full protection in the sale of cement as possible (Resp. Ex. 2991).

Marquette opposed the Lehigh Portland Cement Company's plan in 1930 of rewarding dealers at so much per bbl. at the end of the year. Marquette at that time deemed it of importance to advise its dealers and about November 18, 1930, sent to all dealers in its territory a circular letter relating to Marquette continuing its policy of affording its dealers full protection (Tr. 39040; Resp. Ex. 2991; Tr. 39989).

Marquette did not attend meetings in the winter and spring of 1935 at which the subject of direct sale was discussed with representatives of dealers or representatives of competitors (Tr. 39983). Marquette has never combined or agreed with anyone to limit its sales to any particular individuals nor has it agreed or combined with anyone as to the definition of a party to whom Marquette would make its sales; Marquette has never been restricted by an agreement or understanding as to the parties to whom it would or would not sell cement (Tr. 39052, 6656-8).

Where necessary to meet competition, Marquette has sold directly instead of to the dealer (Tr. 37409-10; Com. Ex. 731-6F).

(g). Marquette's Terms of Sale and Discounts Are Not Result of Understanding With Other Respondents.

Marquette has always independently established its own prices, terms of sale, discounts and methods and means of marketing its product (Tr. 39049, 39051, 2). Certain provisions have long been established in the trade as a custom of the trade. For example, provision as to cash discounts dated from 1926 (Resp. Ex. 2979, 2484). The custom of giving a five-day notice to dealers, dates to 1914 (Tr. 47038, 9). Credit for freight on return of sacks began in 1920.

(h). Marquette Not Involved in Foreign Competition, Boycott of Dealers or Espionage.

Marquette has not at any time engaged in selling any cement at or near any seaboard centers in competition with cement imported from any foreign country, and has not engaged in any boycotting of dealers or espionage (Tr. 39037, 6537). Marquette's sales are confined to a part of the Middle West in the Mississippi Valley (see matter under title "Respondents Marketing Area", supra, and as to the matter of foreign cement counsel for the Federal Trade Commission stated that that involved only the Atlantic Seaboard and that it did not involve the Middle West (Tr. 6537).

(See Paragraph One and Seven (e), (f), (i), and (j) of Complaint.)

Purposes and Powers of the Respondent Institute.

The articles of association submitted to the respondent, Marquette Cement Manufacturing Company, in the spring of 1933, before it became a member of the Institute, were the same as Respondents' Exhibit 2989. They were subsequently amended as of December 11, 1935, as shown in Commission's Exhibit 561.

The articles of association of the respondent Cement Institute limit its powers and purposes (Tr. 16712). They provide that its powers may be exercised solely by a board of trustees in meetings duly assembled. There is no provision for delegation of any powers granted to the trustees,

to any individual, officer, trustee, committee, bureau, or other agent.

Membership of Marquette in the Institute.

In the spring of 1933 the executives of Marquette were advised that a code of fair competition for the Portland cement industry was being formulated under the provisions of the National Recovery Act and that other members of the industry were joining the respondent Cement Institute, which was in charge of formulating the Code, and that it would be for Marquette's best interests to join the Institute to protect its interests in the formulation of the Code (Tr. 39033; Resp. Ex. 2988, 2989 A-H. See also stipulation by counsel for Commission that various respondents joined the Institute in anticipation of the N.I.R.A. program, Tr. 33912). Under date of June 15, 1933 Marquette applied for membership in the Institute, subject to its approval of the Code (Tr. 39032-4, 13969-70, 16977-8).

Marquette continued its membership in the Institute after the decision in the Shechter case and the announcement of the President discontinuing the Code of 1935, because there was talk at that time of a new Code and new regulatory measures by the Government and its executives considered it should remain a member in order to protect its interest should any such thing arise (Tr. 14065, 4174, Resp. Ex. 31).

Marquette formally resigned as a member of the Institute on the 22nd of April, 1938 (Resp. Ex. 93; Tr. 39037), but Marquette for all practical purposes had severed its connections with the Institute in the summer of 1936 when Marquette ceased furnishing statistics to the Institute.

In 1936 Marquette ceased to pay dues to the Institute as required in the articles of association, but expressed its willingness to pay dues on some other mutually agreeable basis and asked for a proposal (Resp. Ex. 90). Marquette never received any proposition from the Institute, as suggested, as to the payment of dues on any other basis and did not thereafter receive any such statement or bill from the Institute (Tr. 14065).

At no time was any officer, employee or representative of Marquette a trustee or officer of the Institute, or a member of any committee of the Institute, a member of the Code Authority, or any committee of the Code Authority (Tr. 14059-60).

Marquette's Relationship to the Code of Fair Competition Under N.R.A.

Marquette had immediate objections to the provisions of the proposed Code and voiced them (Tr. 13971, 40006-7). Its original objections were in writing mailed to the Cement Institute and to all members of the industry (Tr. 13971-3; Com. Ex. 2603 A-F).

Marquette's position at the time of the formulation of the N.R.A. Code was that it should cover wages and hours of employment only; everything else should be left out of it (Tr. 40006; Resp. Ex. 87 for I. D., subsequently marked Com. Ex. 2629, p. 2; Tr. 14517-14520, inclusive). The first printed draft of the Code submitted as of July 19, 1933, is Commission's Exhibit 556. At this time Marquette's membership in the Institute was still conditional and it had not approved the Code (Com. Ex. 556, p. 9, Ex. A, footnote; Com. Ex. 2603-A).

Marquette never at any time entered into any combination, agreement, conspiracy or arrangement, directly or indirectly, with any other person, firm or corporation, for the adoption, retention or establishment of: (a) either the Code for the Portland cement industry; (b) or any provision in the N.R.A. Code of the Portland cement industry; (c) or any plan requiring, or in any manner arranging for, the division of customers or purchasers of Portland cement into any sort of classes or into classes of those who were to be sold directly and those to whom producers should not sell directly (Tr. 39036); (d) or any other plan or agreement for the division or allocation of orders or sales of cement between any persons, firms or corporations competing with Marquette in commerce. Marquette, through its agents, actively opposed any such arrangement when the same was proposed in 1933, and continued at all times subsequently to oppose it, and no such practice, plan, combination or agreement in anywise involving Marquette ever came into being (Tr. 39036-7).

Marquette objected to the price provisions of the Code as restraining its independence (Tr. 14000-3; Com. Ex. 2603-B). Marquette's first written objection to the Code of August 9, 1933 objected to the proposed Code as a whole and especially to provisions requiring reports of confidential information; to inclusion of any plan for control of production, allocation of business, fixing of prices, and to

any unlimited or dictatorial control being vested in the Code Authority (Com. Ex. 2603-A-F; see also Com. Ex. 556, printed copy of proposed Code; Tr. 14064).

Marquette specifically objected to inclusion in the Code of any provision for determining reasonable prices, stating:

"We must retain for ourselves the right to prescribe a course of action which to us seems imperative under circumstances such as might arise from time to time" (Com. Ex. 2603A-F).

Marquette continued its objections to the Code. In September, 1933, it filed a printed brief with the National Recovery Administration objecting to the proposed Code as modified, particularly as to inclusion of any plan for controlling either production or allocation of business and any authority of the Code Authority to regulate or approve price changes (Com. Ex. 2629).

The Code was approved by the President on November 27, 1933 (Com. Ex. 557).

Marquette continued to object to and advocated modification of the Code and in January, 1934 filed with the N.R.A. a petition for modification specifically so as to grant the right to sell state governments "under contracts for delivery periods as specified in formal requests for bids," and particularly, of Article XI of the Code (Resp. Ex. 88 for iden., remarked as Com. Ex. 2630; Tr. 14517-20).

Following the complaint and petition for modification filed by Marquette, Article XI of the Code was suspended and was never restored (Tr. 85-6-7).

Meetings Attended by Marquette Representatives.

(See Complaint Paragraph Seven (f).)

The meetings attended by representatives of Marquette were within the period beginning June 15, 1933 and subsequent thereto. Principally these meetings referred to the formulation of the N.R.A. Code or the modification thereof. (Resp. Ex. 2173-A, Minutes Trustees, Cement Institute, June 15, 1933; District Meeting of Cement Institute June 23, 1933, Comm. Ex. 828-6T through 7H; Com. Ex. 606-A to J, Minutes of Institute Trustees, June 27, 1933; Com. Ex. 608-A through 608-O, purported minutes of Institute Trustees, August 15, and 16, 1933; Com. Ex. 597-A through D, Minutes of Industry Members March 14,

1935; Com. Ex. 623-A through C, Minutes of Meeting, Cement Institute Trustees June 10, 1935; Com. Ex. 623-B through D, purported minutes of Meeting of Institute June 19, 1936).

In addition there was a meeting of the Trustees of the Institute called for the purpose, among other things, of discussing Marquette's letters relating to ceasing to furnish statistical information, which the President of Marquette refused to attend, as shown by Commission's Exhibit 1025-L.

Marquette was not a regular competitor of the Aetna Company and had no interest in the internal affairs of that company (See testimony of D. S. Colburn, Tr. 39041, 39042). The one meeting which was referred to by the witness Cree and which was attended by Colburn, Vice President of the respondent Marquette, was a meeting of December 15, 1935, where Mr. Johnson, formerly President of the Aetna Company, read a statement of Aetna's policies. Colburn was invited to attend this meeting without knowing the nature of it. He did so, staying only a few moments and hearing only Mr. Johnson haranguing Mr. Cree and a Mr. Lingeman about the unprofitable investments and policies of Aetna (Tr. 39041, 2).

Marquette Always Objected to Any Report to Competitors of Its Confidential Business Statistics.

Marquette had always objected to exposing confidential information as to its statistical records of production and sales (Tr. 14063-4) (Com. Ex. 2610-A to C, Marquette letter to F. T. C. June 12, 1931, which upon request of F. T. C. disclosed to it business statistics in confidence). During the period of formulation of the Code Marquette objected to inclusion of any provision for the disclosure of such statistical information (Com. Exhibit 2603-A to F, August 9, 1933, and in connection see Proposed Code of Fair Competition for Cement Industry, Com. Exhibit 556).

During the Code Period Marquette furnished to the Code Authority or the Institute such statistical information as it was required to furnish by the Code, and it continued to do so after the discontinuation of the Code during the interim period when there was a prospect of the formulation of a new Code. In 1936 its officers and executives concluded that there was no immediate likelihood of the adop-

tion of a new form of N.R.A. Code or code similar to the N.R.A. Code for the industry, and in accordance with the policies it had theretofore followed in the matter of keeping confidential the details of its business, Marquette ceased to send to the Institute any further statistical information (Tr. 14043; Respondents' Exhibits 89 and 90; Commission's Exhibit 1025-C through E, letter to Institute July, 1936; 1025-F, 1025-G and H, 1025-J and 1025-L, Tr. 39037, 4418).

Relating to the matter of keeping its statistical information confidential, it appearing to the officers and executives of Marquette that if it continued to furnish statistical information as requested to the U. S. Bureau of Mines, it might be an indirect method of disclosing information to the industry, Marquette refused to continue to furnish such information to the Bureau of Mines (Tr. 39037-8, Commission's Exhibit 2908; Tr. 14063).

As to Marquette's reasons and the action it took in declining to send information with reference to its shipments and its stock on hand, not only to the Institute but to the Bureau of Mines, its executives felt that if it were the only company who was refusing to supply information on shipments and stock and production to the Institute, and if it furnished such information to the Bureau of Mines, by the process of deduction its confidential information could be none the less ascertained (Tr. 39038, 14064, Com. Ex. 1025-J). Marquette's attitude as to furnishing statistics was in conformity with the position it had formerly taken and its objections to the C de, as shown by Commission's Exhibit 2603, page 5, under Article IV (Tr. 14061-90). After Marquette ceased to send any more statistical information to the Institute it did not thereafter send any other information (Tr. 14068) and it did not thereafter receive any more statistical information from the Institute (Tr. 4419, Com. Ex. 1025-O). It was stricken off that list (Tr. 14069). Marquette did not desire its competitors to know the details of its business nor did it desire to know the details of its competitors' business but desired to run its own business in its own way (Tr. 39984-5, Com. Ex. 1025-G, H).

Institute Had No Influence on Marquette's Pricing, Marketing Methods, or Manufacturing Policies.

The Institute did not influence or control Marquette in carrying out any method of pricing, bidding or marketing cement, except in so far as during the Code Period Marquette made price filings with Code authority which was selected through the Institute and received price filings therefrom, and for a few months in 1935 after the Code authority ceased to function Marquette received price filings from the same group who were styled "The Trade Practice Committee." This practice was entirely discontinued prior to the end of 1935 and never again undertaken (Tr. 14076-7, 39037-8) (Com. Ex. 991).

Cement Institute Did Not Control Marquette's Policies.

At no time did the Cement Institute in any manner influence or control Marquette's sales, pricing or general marketing or manufacturing policies, directly or indirectly (Tr. 39038). Marquette has always formulated its own prices and policies (Tr. 39049, 39051, 2; 14004). Marquette has never referred any question of policy to the Institute or division office thereof. Marquette has not been represented on any committees of the Cement Institute or on the board of trustees, nor had it any representative with the Code Authority (Tr. 14059-60); it has attended very few meetings of the Institute, and has not in any way used the Institute meetings or the officials, committees or bodies of the Institute, to promote any system of pricing or policy of selling cement. Marquette is not a member of any sectional or local group of producers (Tr. 39,038).

Certain actions relating to the Cement Institute were not generally divulged to the members and Marquette had no knowledge thereof (Tr. 3304).

L. Advertisements.

(See Complaint Paragraph Seven (j).)

Marquette at no time caused or published advertisements concerning any method of pricing cement; Marquette took no part whatsoever in the preparation or issuance of any advertisement by the Cement Institute. Such advertisements as were published by any other respondent were published as expressions of opinion with no false representation.

(See Paragraph Four of Complaint.)

Agreement or Combination to Restrain Competition Denied.

A. The respondent Marquette has not combined, contracted or in any manner agreed with any other respondent directly or indirectly to hinder, lessen, restrict or restrain competition in the price of cement, or otherwise to hinder, lessen, restrict and restrain competition in the sale of cement in commerce (Tr. 14003, 39051-2).

B. The witnesses who denied the combination charge in Paragraph Four of the Complaint were major executives of respondent, in position to know facts over a period of more than eight years prior to the filing of the Complaint.

Members of the Marquette staff called as witnesses were W. A. Wecker, President and Treasurer of the respondent, connected with the Company since 1914 in various capacities, as clerk, collector, traveling collector, credit manager, Secretary, Treasurer, Vice President, and succeeding to the presidency upon the death of the then President, Theodore G. Dickinson, July 2, 1933 (Tr. 13960-2, 14074), and D. S. Colburn, connected with the Company since 1924, first as engineer, then as assistant to the President, Theodore G. Dickinson, and in 1933 placed in full charge of matters relating to the N.R.A. Code, and becoming Vice President in 1934 (Tr. 39032-3-4).

Exceptions to Other Erroneous Findings.

9. For that the Examiner has failed to report that the respondent Marquette Cement Manufacturing Company was represented by separate counsel not in anywise associated with counsel of record for any other respondents.

10. For that the Examiner has under the heading, "Report upon the Evidence," Section No. 1 found that the respondent Institute was organized August 20, 1929 and that all of the respondents have belonged at one time or another to the organization which has functioned since 1929 under its Articles of Association and the following agreements and authorities:

(a) a Code of Ethics adopted at the original organization in 1929;

(b) A Code of Fair Competition for the Cement Indus-

try approved under the National Industrial Recovery Act on November 27, 1933 (Com. Ex. 557).

whereas the Examiner should have found that the respondent Marquette Cement Manufacturing Company and numerous other manufacturing respondents took no part in and were not in anywise directly or indirectly involved in the organization of a cement institute in 1929 or in the adoption of any Code of Ethics such as Com. Ex. 138-B to U, nor did Marquette at any time ever have notice thereof brought home to it, nor did Marquette at any time ratify or approve the Articles of Association of the Institute organized in 1929 such as Com. Ex. 136-A to M or any Code of Ethics such as contained in Com. Ex. 138-B to U, and the Examiner should have further found that the said Code of Ethics was canceled at or before the time when Marquette Cement Manufacturing Company became a member of the Institute in June, 1933 (Com. Ex. 605-A to C, and Resp. Ex. 217-A to C).

As to the Code of Fair Competition referred to by the Examiner, the Examiner should have found that the Cement Institute which the respondent Marquette Cement Manufacturing Company and many other corporate respondents joined in 1933 was not the same as any Cement Institute organized in August, 1929, nor did it have the same Articles of Association, nor did the Institute organized, or reorganized in 1933 function under Articles of Association adopted in 1929, a Code of Ethics adopted in 1929 or at any subsequent time, but on the contrary the respondent Institute, joined by Marquette in 1933, functioned under Articles of Association prepared and submitted to respondent Marquette a short time before it made application to become a member of the Institute in June, 1933. That the Articles of Association submitted to Marquette in 1933 before it became a member of the respondent Institute, was Resp. Ex. 2989. The Examiner should have further found that the respondent Marquette did not at any time have any knowledge of or any part in the formation or functioning under Articles of Association adopted in 1929, introduced in evidence as Com. Ex. 136-A to N, or the Code of Ethics adopted in 1929 by some of the respondents, introduced in evidence as Com. Ex. 138-B to U (Com. Ex. 1270-B through J).

For that the Examiner has found that the Institute functioned under the Code of Fair Competition whereas he

should have found that the Code of Fair Competition was not applicable to the Institute and did not affect the authority of the Institute in any manner.

For that by the language contained in subparagraph (d), paragraph 1, page 7 of the Examiner's Report, it is made to appear that the first and only amendment of the Articles of Association of the Institute subsequent to 1929 came about in December, 1935 (Com. Ex. 561, pages 210 to 229. See also transcript 30008-37, cited by the Examiner in support of his statement), whereas the Examiner should have found that so far as the respondent Marquette and many other respondents were concerned, they joined the respondent Institute in 1933 under entirely new Articles of Association (See Resp. Ex. 2989).

11. For that whereas in Section 41, on page 18 of the Examiner's Report it is reported as to the respondent Marquette that "It was involved in identical bidding as follows: June 5, 1934 (Com. Ex. 166); on March 25, 1936 (Com. Ex. 1878); and on March 12, 1938 (Com. Ex. 1914)," the said finding being offered as an example presumably contained in the complaint as set forth on page 4 of the Examiner's Report wherein he states as part of the Examiner's synopsis of the complaint,

"That respondent submitted identical bids, concertedly arrived at to various governmental agencies and others, the same as or similar to the examples set out and hereinafter referred to in this report;"

whereas the Examiner should have found that Commission's Exhibit 166 was but one of a series of exhibits offered by Commission's counsel in support of their claim of unlawful combination and agreement charged in paragraph 4 of Count I of the complaint as to submitting identical bid prices to the United States Government and that other pertinent exhibits in the series essential to be considered in connection with Commission's Exhibit 166 are as follows:

Com. Ex. 164-E, is a telegram from the Code Authority dated May 3, 1934 to the Respondent Marquette and others, giving the lowest destination cost filed at Wiota, Montana, and 164-J, being a telegram from the Code Authority to the Respondent Marquette and others, dated May 31, 1934, giving the destination cost to Wiota, Mont. of $2.7054 in bulk, 2.9145 in paper and 3.1645, cloth, for portland cement and Com. Ex. 164-N, O, being a letter from

the Code Authority dated June 1, 1934 to the Respondent Marquette and others, advising receipt of additional filings of destination costs for Wiota, and Com. Ex. 164-X; a communication to the Respondent Marquette and others, dated June 5, 1934, in regard to the same invitation which applied to the requirements on what was known as the Ft. Peck Dam Tunnel, and which gave the Respondent Marquette the following information: that government rates from LaSalle were .39220 per cwt., and containing a quotation from the invitation as follows: "In evaluating the bid, the following government rates as published by the office of the Quarter Master General, or any other special rates filed with the Quarter Master General prior to the opening of bids will be used." And the Examiner should have further found that in the invitation to bid the government made full disclosure of the applicable land grant rate, and that the price filed as a bid by the Respondent Marquette, as shown in Com. Ex. 166, was a price that a competitor of Marquette had filed with the Code Authority, and of which Marquette had been advised, and that Marquette's bid on this letting was made to meet such filed price (Rec. 3904) which was what Marquette was expected and required to do, as admitted by counsel for the Trade Commission Wooden at Rec. 1579, and that the Examiner should have further found that Com. Ex. 166 was not an example of identical bidding, which constituted any evidence tending to sustain the charge that such identical bid was arrived at by means of any combination, collusion or agreement on the part of the Respondent Marquette, and that there was no evidence in the record before him of any collusion on the part of Marquette, or agreement by it or co-operation by it with any other person, firm or corporation to file or submit a bid which was identical with any other bid.

12. For THAT the Examiner has included in his Report as two further supposed examples of identical bidding as a result of unlawful combination or agreement, Com. Ex. 1878, which is an abstract of bids received by the State of Illinois, Highway Department for letting of March 25, 1936 and which gives as bid prices, delivered prices at various destinations throughout the State, whereas the Examiner should have found that there is no evidence that any of the prices bid at the various destinations by the Respondent Marquette were arrived at by any understand

ing, combination or agreement with any other person, firm or corporation, and that there is no evidence that the prices at the various destinations, bid by the Respondent Marquette as shown by the Exhibit in question, were not the same as the going wholesale market price at each one of the destinations, and further that there was at the time in existence an established wholesale market price for portland cement at all destinations in the State of Illinois (Commission's witness Hamlin, connected with Illinois Highway Commission—Tr. 11834; see also Tr. 11821-2-3-4).

13. For that the Examiner cites Com. Ex. 1914, the abstract of bids taken in the State of Wisconsin May 12, 1938, as showing Marquette involved in identical bidding "concertedly arrived at," whereas the Examiner should have found that Com. Ex. 1914 is an example of bids that were not identical, that Marquette was one of the low bidders on three destinations and that at four destinations Marquette was underbid by three or more competitors. And the Examiner should have further found that there is no evidence in the record tending to show that the prices bid, as shown in Commission's Exhibit 1914 were arrived at by any agreement, combination or conspiracy among the respondents as charged in the complaint.

14. For that the Examiner in the fourth and last paragraph of Section 41 of his report, on page 18, following the heading, "As to Pricing," lists certain pages of the transcript of record and certain exhibits as being applicable to the methods of pricing followed by the respondent Marquette, whereas examination of these references indicates that they by no means cover and include sufficient references to the record and to the exhibits to give a fair picture of the practices of Marquette with reference to pricing.

15. Further specific exception is taken to the Examiner's Report as to sections, beginning on page 31, numbers 88 to 93 inclusive under the titles "The Basing Point System" and "Prevailing Trade Conditions", in that the Examiner has failed to report that the findings therein set forth are not applicable to the respondent Marquette.

16. Specific exception is taken to sections beginning on page 34 of the said Report numbers 94 to 103, inclusive, under the title "Identical Bidding," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Mar-

quette as hereinbefore set forth under the title "COMPETITION ON GOVERNMENT LETTINGS."

17. Specific exception is taken to sections 104 to 113, inclusive beginning on page 38 of the said report under the title "Involuntary Basing Mills" in that therein the Examiner refers to the general use of the so-called basing point method and to the occasional happening of a mill establishing a base at a competing mill's location, and thereafter cites supposed examples of the imposition of such bases on mills without their consent and contrary to their wishes, including in such examples at the top of page 40, in the closing paragraph of section 109 of said Report, a supposed instance of the imposition of such a base at Marquette's mill at Cape Girardeau by the Alpha Company on February 3, 1931, citing in support thereof certain references to the transcript of record and certain exhibits, whereas the Examiner should have found that the evidence adduced by the Commission relating to this incident does not support the finding that the incident is an example that is found by the Examiner in section 104 at page 38 of his Report, but on the contrary that prices then being made by Marquette in selling from its Cape Girardeau mill were lower than prices being made by its competitors, including Alpha (Tr. 14013-4, 14076, 23286, 24587, 24588; Commission's Ex. 971-31A), and the evidence further shows that Marquette never made any complaint as to any such base being put on its Cape Girardeau mill (Tr. 24589).

18. Specific exception is taken to the sections beginning on page 41 of the said Report, numbers 114 to 119, inclusive, under the title "Institute Rate Books," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "INSTITUTE FREIGHT RATE BOOKS NEVER USED BY MARQUETTE."

19. Specific exception is taken to the sections beginning on page 44 of the said Report, numbers 120 to 122, inclusive, under the title "Trucking," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "MARQUETTE HAS NOT CO-OPERATED TO PREVENT TRUCK DELIVERIES."

20. Specific exception is taken to the sections beginning on page 46 of the said Report, numbers 123 to 129, inclusive, under the title "Diversions," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "MARQUETTE HAS NOT CO-OPERATED TO PREVENT DIVERSIONS IN TRANSIT."

21. Specific exception is taken to the sections beginning on page 48, numbers 130 to 138, inclusive, under the title "F.O.B. Mill Prices," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the titles "LAND GRANT RATES ARE ASCERTAINABLE BY RESPONDENTS." "MARQUETTE HAS NOT THWARTED THE EFFORTS OF GOVERNMENT TO OBTAIN F.O.B. MILL PRICES," and "MARQUETTE DID NOT USE A CONTROL CLAUSE AS MEANS OF DEPRIVING GOVERNMENT OF BENEFIT OF LAND GRANT RIGHTS."

22. Specific exception is taken to the sections beginning on page 51, numbers 139 to 145, inclusive, under the title "Dealer. Definition and Policy," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the titles "MARQUETTE DID NOT COOPERATE WITH OTHER RESPONDENTS IN CLASSIFICATION AND DIVISION OF CUSTOMERS NOR ENTER INTO ANY UNDERSTANDING TO LIMIT SALES TO CERTAIN 'CEMENT DEALERS'" and "THE DEALER."

23. Specific exception is taken to Sections 147 and 148 on page 57 under the titles "Confining Sales to the Dealer's Locality" and "Uniform Terms and Discounts," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "MARQUETTE'S TERMS OF SALE AND DISCOUNT ARE NOT RESULT OF UNDERSTANDING WITH OTHER RESPONDENTS."

24. Specific exception is taken to the sections beginning on page 58, numbers 151 to 158, inclusive, under the title

"Imported Cement and Zone Prices," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "Marquette Not Involved in Foreign Competition, Boycott of Dealers or Espionage," and as to section 158, which refers to zone prices, the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under title "Marquette Equalizes Prices to Buyers in Area Where They Are Competing with One Another."

25. Specific exception is taken to the sections beginning on page 60, numbers 159 and 160, under the title "Maintaining the Institute," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the titles "Purposes and Powers of the Respondent Institute," and "Membership of Marquette in the Institute."

26. Specific exception is taken to sections 161 and 162, beginning on page 61, under the title "Propaganda Re the Pricing System," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the titles "Purposes and Powers the Respondent Institute," and "Membership of Marquette In Institute;" and "Advertisements."

27. Further exception is taken to the second paragraph of section 161 on page 61 of the Examiner's Report in that the Examiner erroneously finds and reports that the Cement Information Bureau operated from early in 1934 through 1935 and thereafter, whereas he should have found that the Cement Information Bureau was discontinued in September, 1936 (Tr. 16746; Respondent's Exhibit 127 A-D, being the report of the Institute General Manager dated 12/10/36 relating to the action of the Board of Trustees on September 10, 1936 restricting the activities of the Institute to certain types of activities listed in the said report and approving the report of a Special Committee appointed June 19, 1936 at a special meeting of the Institute held to consider the dissolution of the Institute).

28. Specific exception is taken to section 163 on page 62 under the title "Dual and Area Bases," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

29. Specific exception is taken to section 164 on page 62 under the title "Price Leadership," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

30. Specific exception is taken to section 165 on page 63 under the title "Price Rigidity," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

31. Specific exception is taken to sections 166, 167 and 168 under the title "Agreements, Understandings and Communications," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette except as to the first paragraph of section 166, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "Agreement or Combination to Restrain Competition Denied." Section 167 and 168 are not pertinent or relevant to any issue.

32. Specific exception is taken to sections 169 and 170 on page 65 under the title "License Agreement Association," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

33. Specific exception is taken to the sections beginning on page 65, numbers 171 to 174, inclusive, under the title "Other Organization Activities," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

34. Specific exception is taken to the sections beginning on page 68, numbers 178 to 183, inclusive, under the title "Various Cooperative Activities," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

35. Specific exception is taken to the sections beginning on page 70, numbers 184 to 187, inclusive, under the title "The Cree Incident," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and specifically as to the reference to D. S. Colburn, Vice President of respondent Marquette, in section 186, the Examiner should have

found as hereinbefore set forth in the third paragraph under the title "Meetings Attended by Marquette Representatives."

36. Specific exception is taken to the sections beginning on page 61, numbers 188 to 195, inclusive, under the title "Opposing New Mills," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

37. Specific exception is taken to section 196 on page 73, under the title "Collective Bidding," in that the Examiner has failed to report that the findings therein reported are not applicable to Marquette.

38. Specific exception is taken to the sections beginning on page 74, numbers 197 to 199, inclusive, under the title "The Burns and Clark Studies," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette. (See Commission's Ex. 1173 L-Q.)

39. Specific exception is taken to section 201 on page 75 under the title "Price Filing," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

40. Specific exception is taken to sections 202 and 203, beginning on page 75, under the title "Contract Checking," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

41. Specific exception is taken to section 204 on page 76 under the title "Returned Sack Allowances," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, whereas the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "Marquette's Terms of Sale and Discounts are not Result of Understanding with other Respondents."

42. Specific exception is taken to sections 205 and 206, beginning on page 78, under the title "Reciprocal Shipments," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and specifically objects to the statement in section 205, "Marquette Received larger mill nets on cement shipped by Kosmos for its account (Tr. 12408-10)" in that the statement is not supported by the evidence nor by reference to the record, but, on the contrary, the

evidence is that Kosmos got the full benefit of the sale, and the evidence does not support any finding or conclusion that respondent Marquette was in anywise involved in any "reciprocal shipments" as described in the Examiner's Report, but, on the contrary, the only evidence relating to shipments made directly or indirectly for the account of Marquette by other companies indicates that Marquette on certain occasions was oversold and unable to ship all the cement that it had sold (*e. g.*, in the year 1932), and the record further shows that inquiry relating to this subject was made by counsel for the Commission to counsel for respondent Marquette and that full and complete information in regard to all such shipments was offered on the record by the counsel for respondent Marquette (Tr. 19175-19206, inclusive).

43. Specific exception is taken to the sections beginning on page 78, numbers 207 to 211, inclusive, under the title "Standardization of the Product," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette. (As to section 208, see exceptions hereinbefore stated under title "Respondent Institute."

44. Specific exception is taken to the sections beginning on page 80, numbers 212 to 219, inclusive, under the title "Production and Shipment Statistics," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, whereas the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "Marquette Always Objected to Any Report to Competitors of Its Confidential Business Statistics."

45. Specific exception is taken to the sections beginning on page 83, numbers 220 to 223, inclusive, under the title "Secretive Methods," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette.

46. Specific objection is taken to the sections beginning on page 85, numbers 225 to 227, inclusive, under the title "Expert Economic Testimony," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette and the Examiner should have found that respondent Marquette repeatedly objected to the testimony of economists called on behalf of the Commission and that the testimony of said

economists was received over the objection of the respondent Marquette, that Marquette did not call any economic witnesses or adopt the testimony of any economic witnesses called by other respondents, and that the respondent Marquette did not contend at any time that its methods of pricing and distribution are more economical or more in accord with the public interest than any other method, and, on the contrary, it has persistently taken the position that there is no question or issue in this proceeding under the complaint and Marquette's answer thereto, or otherwise, as to whether or not the methods of pricing and distribution used by the respondent Marquette or by other respondents are more or less economical or more or less in accord with the public interest than any other method that could be employed, but, on the other hand, Marquette has and still does contend that the sole question at issue is whether or not the methods of pricing and distributing used by the respondent Marquette and other respondents were adopted, maintained and used as a means of effecting combination in restraint of trade as charged in the complaint.

47. Specific exception is taken to sections 228 and 229, beginning on page 87, under the title "Competition," in that the Examiner has failed to report that the findings therein reported are not applicable to respondent Marquette, and the Examiner should have found and reported as to respondent Marquette as hereinbefore set forth under the title "Marquette Makes Independent Prices."

Report Improper in Form.

48. For that the Examiner's Report is confusing and argumentative and not confined strictly to findings of fact. It does not follow the order of the complaint and it does not recognize and treat separately the individual defenses put in by individual respondents, but entirely ignores the respondent Marquette and other respondents as individual respondents conducting a defense separate and distinct from any defense conducted by or on behalf of the Institute and other respondents. The Examiner has not pretended to find all of the facts but has selected only such facts as in his opinion

"furnish bases for findings which your Examiner deemed abundantly supported by the weight of the evidence contained in the entire record," (see Sec. 82, page 29)

whereas the Examiner should have included in his report all of the facts pertinent and relevant to the issues formed by the complaint and the several answers and should have allowed the weight of the evidence and conclusions based thereon to be determined by the Federal Trade Commission.

Respectfully submitted,
Edward A. Zimmerman,
Harold W. Norman,
Attorneys for respondent, Marquette Cement Manufacturing Company.

UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—3167)

EXCEPTIONS OF NORTHWESTERN PORTLAND CEMENT CO., INC., RESPONDENT, TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Received Nov. 10, 1941.)

The size of the record, the number of exhibits on file, and the minor role played by this respondent in this proceeding and the cement industry generally make it a practical impossibility for this respondent to take specific or detailed exceptions to the Trial Examiner's Report as a whole, or to those portions of it which deal with the cement industry generally.

Exception No. 1.

As its first exception, therefore, respondent adopts the exceptions taken by the other respondents herein and by reference thereto incorporates them herein and makes them a part hereof as fully as though set forth herein.

Exception No. 2.

Exception is taken to the failure of the Trial Examiner to state in his comment on "The Answers" on Page 6 of his Report that this respondent denies that it is or has been engaged in interstate commerce.

Exception No. 3.

Exception is taken to the statement in Paragraph 51 of the Report that "This company sold and shipped cement from Grotto in the State of Washington into . . . Vancouver, B. C. in 1930 and 1931." To support this finding, the Trial Examiner refers to Tr. 8595-6. A cursory examination of these pages of the Transcript discloses that the Examiner's statement is erroneous. He has confused the City of Vancouver in the State of Washington with the City of Vancouver in British Columbia, Canada. Vancouver, Washington is a city having a population of approximately 23,000 and is situated on the Columbia River directly across from Portland, Oregon and connected with it by a bridge across the river. The Columbia River serves as the southern boundary of the State of Washington and the northern boundary of the State of Oregon for a distance in excess of two hundred miles, running easterly from the Pacific Ocean. The record plainly shows that Mr. Hollister, the President of the Northwestern Portland Cement Company, first testified that the company had sold cement in Oregon during, but not since, 1928 or 1929, and he then discussed the sale of cement in the Vancouver region of the State of Washington along the Columbia River. Because it is important to the contention of this respondent that it has not engaged in interstate commerce since 1929, we shall set forth in toto the testimony referred to by the Trial Examiner from Tr. 8595-7:

"Q. Did your mill at one time sell into Oregon?

A. We did, sir, yes, sir.

Q. When was that?

A. From 1928 to the latter part of 1929.

Q. Was that during part of the period of this price war that has been referred to?

A. No, sir.

Q. Did I understand you have not sold into Oregon since the price war

A. Before the price war. It was in 1929.

Q. You have not sold any into Oregon since—

A. (Interrupting) Since 1929, no, sir.

Q. Of course that was before the price war. What is the reason you discontinued business in Oregon?

A. Well, after we came into production, we were maintaining an office in Portland to sell cement and look after

things—the president's office was there. We had an office there to sell cement, and to look after the presidential details, and we started in to sell cement, and in 1929 the Board of Directors ordered us to close the office up. We lost money on every barrel of cement we sold in Oregon, and we quit.

Q. You kept it up for a long period of time, losing on every barrel?

A. No.

Q. A year or so?

A. From June, 1928, to the latter part of 1929, yes, sir.

Q. Had you received any smaller mill net in the border towns along the Columbia in Oregon than you received in the border towns in Washington?

A. I would call along the Columbia River, Vancouver, Columbia River, a distress territory. Prices are so low there that I would be insane to go down to sell.

Q. Do you go to Vancouver now?

A. No, sir.

Q. You have gone to Vancouver in the past?

A. I don't think we have been in Vancouver since 1929; 1930 or 1931; along in there some time. (Tr. 8595-7)

Note that the only mention is of Vancouver on the Columbia River. No mention is made of British Columbia or Canada.

Note further, that the witness speaks of going down to Vancouver. Vancouver, Washington is some two hundred miles south of Seattle and Grotto, while Vancouver, British Columbia is some one hundred miles north of Seattle. As would be expected, in the common parlance of this area, one goes down when he goes south and up when he goes north.

Note further, Transcript 48115 where the following testimony appears:

"However, Northwestern has neither sold nor shipped any cement outside the State of Washington since some time in the year 1929."

Obviously, this statement would not have been made if the sales in Vancouver in 1930 and 1931 had referred to sales in Vancouver, B. C.

Exception No. 4.

Exception is taken to Paragraph 53 of the Examiner's Report wherein it is indicated that this respondent is engaged in interstate commerce and sells its products to locations in other states and territories. Reference is made in this paragraph to the Answers. We have already pointed out that this charge is specifically denied in this respondent's Answer. Reference is further made to the paragraphs not pertaining to Northwestern. We have likewise already referred to the paragraphs pertaining to this respondent and it was shown that there is no evidence of activities in interstate commerce on its behalf.

Exception No. 5.

Exception is taken to that portion of Paragraph 51 wherein it is stated that respondent was engaged in identical bidding. To support this statement the Examiner's Report speaks of two bids, one of February 21, 1935 and one of August 20, 1935, but these were either during the N.R.A. Cement Code Period or during the "twilight" period immediately following, and are the sole authority for this position cited by the Examiner's Report in this paragraph.

Exception No. 6.

Exception is further taken to the failure of the Trial Examiner to find that this respondent was not engaged in identical bidding. Such a finding is called for by the record.

(Respondent's Exhibits 264-A to H; 348 to I; 344 A to L; 345 A to J; 358 to K; 371 A to E; 372 A to W; 373 A to M; Tr. 256, 21,791).

Exception No. 7.

Exception is taken to the failure to find that inquiries by respondent in the field have brought to light many cases of differentials between it and its competitors as to prices, discount periods, etc., indicating that it was not engaged in identical bidding nor pricing. (Tr. 48,120).

Exception No. 8.

Exception is taken to that portion of Paragraph 51 wherein the Examiner refers, in support of his statement "As to Pricing" to Com. Ex. 967 to L and to 11 B, for the reason that the exhibits referred to have no bearing on the question.

Exception No. 9.

Exception is taken to that portion of Paragraph 51 wherein the Examiner cites in support of his statement "as to Meetings," Tr. 9151. Page 9151 contains testimony by Mr. Keller pertaining to the Pacific Coast Cement Institute. Page 9151 makes no reference to Northwestern and, in fact, Mr. Keller's testimony on the preceding page (Tr. 9150) exonerates rather than implicates this respondent. We shall quote one question and answer:

"Q. Were all the companies on the Pacific Coast members?

A. Companies west of the Sierra Nevada mountains and the Cascade mountains, with the exception of the Cowell Company and the Northwest Portland Cement Company at Grotto, Washington."

Exception No. 10.

Exception is taken to Paragraphs 82 through 92, ending with "The Basing Point System", for the reason that there is no testimony in the case which establishes or suggests that Northwestern employed a multiple basing point system. The testimony affecting this respondent is to the contrary. (Tr. 8586-89; 8577; 48,115-6)

Exception No. 11.

Exception is taken to Paragraph 93 for the reason that there is no evidence connecting this respondent with the general practices therein discussed.

Exception No. 12.

Exception is taken to any suggestion contained in Paragraphs 94 et seq. from which any inference might be

drawn that this respondent was engaged in identical bidding.

(Reference has already been made to the record insofar as this respondent and the problem of identical bidding are concerned).

Exception No. 13.

Exception is taken to Paragraphs 104 to 113, inclusive, entitled "Involuntary Basing Mills". The inference might be drawn from the general language therein employed that this respondent was connected with the practices therein discussed, although the record does not support such inferences.

Exception No. 14.

Exception is taken to Paragraphs 114 to 119, inclusive, entitled "Means Employed—Institute Rate Books". The general language therein employed is seemingly broad enough to cover all respondents, although it is frankly admitted in Paragraph 115 that no freight rate books were issued to cover the State of Washington. The record further affirmatively shows that this respondent at no time used any freight rate books, either Institute or otherwise, and has not disseminated any freight rate information. (Tr. 48,116, 48,119).

Exception No. 15.

Paragraphs 120 to 122 pertaining to "Trucking" are excepted to by this respondent because the record is silent insofar as this respondent is concerned on the matters therein discussed.

Exception No. 16.

Exception is taken to any inferences contained in Paragraphs 130 to 138 inclusive, insofar as they might affect this respondent. Northwestern has regularly bid f.o.b. mill. (Tr. 21,554; Respondent's Ex. 264-A to E; 340 A to H; 344 A to L; 369 A to Z; 370 A to K; 371 A to E.)

Exception No. 17.

Exception is taken to Paragraphs 139 to 146, inclusive, entitled "Dealer Definition and Policy." None of the references therein set forth in any manner connect Northwestern therewith and the record does not contain such testimony. Northwestern at no time agreed to adopt the so-called "Compendium" or the practices set forth therein. (Tr. 48,117). The reference in Paragraph 142 to Northwestern is not borne out by the record as applying to this respondent.

Exception No. 18.

Exception is taken to Paragraph 147 entitled "Confining Sales to the Dealer's Locality." There is no evidence or evidence from which any inference can be drawn that Northwestern indulged in any such practice.

Exception No. 19.

Exception is taken to Paragraphs 148 to 150 inclusive, pertaining to "Uniform Terms and Discounts" because the record does not in any way connect this respondent with any such practice. Furthermore, Northwestern did not adopt or use the so-called "Compendium." (Tr. 48,117).

Exception No. 20.

Exception is taken to Paragraphs 151 to 158 inclusive, entitled "Imported Cement and Zone Prices", for the reason that the record is silent insofar as Northwestern is concerned with reference to any of the matters therein set forth.

Exception No. 21.

Exception is taken to the inferences contained in Paragraphs 159 to 160 insofar as they might be considered involving Northwestern. Northwestern did not use any special services such as freight rate books, contract checking services or credit reporting service which may have been offered by the Institute. Northwestern has never made any reports to the Institute or any other organization con-

cerning any sales contracts or any other information revealing the course of its business or sales policies, except that Northwestern followed the N.R.A. Code during the Code period. (Tr. 48,186-7).

Exception No. 22.

Exception is taken to Paragraph 161 entitled "Propaganda Re the Pricing System", for the reason that there is nothing in the record to connect Northwestern with any matters therein set forth.

Exception No. 23.

Exception is taken to Paragraph 163 entitled "Dual and Area Bases", for the reason that there is nothing in the record to connect Northwestern with the matters therein set forth.

Exception No. 24.

Exception is taken to Paragraph 164 entitled "Price Leadership", for the reason that there is nothing in the record to connect Northwestern with any matters therein set forth. Northwestern did not fill out any Burns and Clark Questionnaire or Report.

Exception 25.

Exception is taken to Paragraph 165 entitled "Price Rigidity", for the reason that there is nothing in the record to connect Northwestern with any matters therein set forth.

Exception No. 26.

Exception is taken to Paragraphs 166 to 168, inclusive, entitled "Agreements, Understandings, and Communications", for the reason that there is nothing in the record to connect Northwestern with any matters therein set forth. Further, the matters therein set forth all occurred long prior to the birth and founding of Northwestern, which was not organized until December 13, 1926 and did not operate until May of 1928 (Tr. 48,115).

Exception No. 27.

Exception is taken to Paragraphs 169 to 170, inclusive, entitled "License Agreement Association", for the reason that all matters therein set forth similarly antedated the existence of Northwestern.

(See preceding Exception.)

Northwestern was never a member of the "Association of Licensed Cement Manufacturers."

Exception No. 28.

Exception is taken to Paragraphs 171 to 172, inclusive, entitled "Other Organization Activities," for the practices therein set forth likewise antedate the existence of Northwestern. Northwestern was never a member of the "Cement Manufacturers Protective Association." (Tr. 48, 118).

Exception No. 29.

Exception is taken to Paragraphs 173 to 175, inclusive, for they in no way affect Northwestern.

Exception No. 30.

Exception is taken to Paragraph 174 wherein it is found that Northwestern is a member of the Pacific Coast Cement Institute. To support this position, reference is made to Transcript 9151. This page of the Transcript is silent on the membership of the Institute. However, on the preceding page, Tr. 9150, it is specifically stated that Northwestern Portland Cement Company at Grotto, Washington was not a member of the Pacific Coast Cement Institute. The exact testimony on this point given by Mr. Keller at Tr. 9150 is as follows:

"Q. Were all the companies on the Pacific Coast members?

A. Companies west of the Sierra Nevada Mountains and the Cascade Mountains, with the exception of the Cowell Company and the Northwest Portland Cement Company at Grotto, Washington."

Exception No. 31.

Exception is taken to Paragraphs 178 to 183 inclusive, for the reason that the inference might be drawn that Northwestern was involved in certain matters therein set forth, whereas in fact, the testimony in no way connects Northwestern with any matters therein set forth. Northwestern never issued any price lists nor used any. (Tr. 48,115-48,119, inclusive).

Exception No. 32.

Exception is taken to Paragraphs 184 to 187, inclusive, entitled, "The Cree Incident", for the reason that there is no testimony in the record to connect Northwestern with the matters therein set forth.

Exception No. 33.

Exception is taken to Paragraphs 188 to 195, inclusive, entitled, "Opposing New Mills", for the reason that there is no testimony in the record to connect Northwestern with any such situation and none of the references therein set forth pertain to Northwestern.

Exception No. 34.

Exception is taken to Paragraphs 197 to 199 inclusive, entitled, "The Burns and Clark Studies", for the reason that the very references therein contained show that Northwestern was not included in the Burns and Clark studies and did not file any Questionnaire.

Exception No. 35.

Exception is taken to Paragraphs 202 to 203, inclusive, entitled "Contract Checking", for the reason that Northwestern was at no time or in any wise connected therewith and has never used any contract form and has never agreed with any other cement company nor with the Cement Institute or any other organization as to any contract form. It seldom uses any written memorandum of any sort in the nature of a contract (Tr. 48,118). An exception is taken to the failure of the Examiner to so find affirmatively.

Exception No. 36.

Exception is taken to Paragraphs 207 to 211, inclusive, entitled "Standardization of Product", for the reason that the testimony in no wise connects Northwestern with any matters therein set forth.

Exception No. 37

Exception is taken to Paragraphs 212 to 215 inclusive, entitled "Production and Shipment Statistics" for the reason that Northwestern was not organized until after the happenings therein set forth. (Tr. 48,115).

Exception No. 38.

Exception is taken to Paragraphs 220 to 223, inclusive, entitled "Secretive Methods", for the reason that the matter in no wise affects Northwestern.

Exception No. 39.

Exception is taken to Paragraphs 224 to 229, inclusive, entitled "The Price Issue", for the reason that the same are irrelevant and immaterial and in no wise affect the issues in this matter nor this respondent.

Exception No. 40.

Exception is taken to the failure of the Examiner to find that Northwestern has never made any classification of its customers and has at all times reserved the right to sell direct or through a dealer on any work, for the reason that the record requires and supports such a finding. (Tr. 48,115.)

Exception No. 41.

Exception is taken to the failure of the Examiner to find that Northwestern at no time used any special services offered by the Institute and did not receive any freight rate books, contract checking service or credit reporting service, and that Northwestern did not use any information received from the Institute, for the reason that the record requires and supports such a finding. (Tr. 48,116, 48,117.)

Exception No. 42.

Exception is taken to the failure of the Examiner to find that Northwestern has at no time agreed to adopt the so-called "Compendium" or any practices set forth therein and that in fact Northwestern's practices in many respects were unlike those set forth in the Compendium, for the reason that the Record requires and supports such a finding. (Tr. 48,117.)

Exception No. 43.

Exception is taken to the failure of the Examiner to find that Northwestern has never used any contract form and has seldom used any written memoranda of sale and that its last quotation forms were used prior to November, 1933, for the reason that the Record requires and supports such a finding (Tr. 48,118).

Exception No. 44.

Exception is taken to the failure of the Examiner to find that Northwestern has never entered into any agreement or understanding with any competitor or any other organization or person regarding prices, sales policy or terms of sale, for the reason that the Record requires and supports such a finding (Tr. 48,118-9).

Exception No. 45.

Exception is taken to the failure of the Examiner to find that Northwestern has never received nor distributed any information regarding freight rates and has never followed any practices in concert with other respondents relative to the use of uniform freight rates as a basis of averaging prices,—for the reason that the record requires and supports such a finding. (Tr. 48,119.)

Exception No. 46.

Exception is taken to the failure of the Trial Examiner to find that Northwestern has never entered into any agreement or understanding with any competitor or any other

respondent relative to the diversion of shipments from one destination to another and it has not used a non-diversion stamp and has not taken any measures to eliminate diversion and that diversions of cars in transit have been made from time to time by customers,—for the reason that the record requires and supports such a finding. (Tr. 41,119.)

Exception No. 47.

Exception is taken to the failure of the Examiner to find that Northwestern has never classified its customers except during the N.R.A. Code period,—for the reason that the record requires and supports to such a finding. (Tr. 48,119.)

Exception No. 48.

Exception is taken to the failure of the Examiner to find that Northwestern has not entered into any agreement or understanding with any of its competitors relative to discounts, prepayment of freight, changes in prices or terms of sale, and has never entered into any agreement regarding sales policies,—for the reason that the record requires and supports such a finding. (Tr. 48,120.)

Exception No. 49.

Exception is taken to the failure of the Examiner to find that Northwestern has never boycotted nor threatened to boycott any dealer who handled imported cement,—for the reason that the record requires and supports such a finding. (Tr. 48,121.)

Exception No. 50.

Exception is taken to the failure of the Examiner to find that Northwestern has at all times competed freely and met competition where it found it,—for the reason that the record requires and supports such a finding. (Tr. 48,121.)

Respectfully submitted,

Northwestern Portland Cement Co., Inc.,
By Weter, Roberts and Shefelman,
Its Attorneys.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

(Caption—3167).

EXCEPTIONS TO TRIAL EXAMINER'S REPORT OF RESPONDENT RIVERSIDE CEMENT COMPANY

(Received Nov. 10, 1941.)

Now comes respondent Riverside Cement Company, a corporation (hereinafter referred to as "Riverside"), and respectfully excepts to the Report of the Trial Examiner herein in the following particulars, to wit:

Exception No. 1. Exception is taken generally to the use of the collective term "respondents" as used throughout the report and in various parts or paragraphs thereof insofar as the same refers to or includes or is intended to refer to or include Riverside, excepting only in those instances where evidence of the acts, conduct, omissions or declarations of Riverside, as distinguished from the acts, conduct, omissions or declarations of some other person, firm, association or corporation than Riverside, is called to the attention of the Commission by citation duly made. Specific application of this present exception to subsequent parts or paragraphs of said report will hereinafter be made where appropriate.

This exception and all specific applications of the same hereinafter set forth are based upon the proposition that both counts in the complaint herein charge an alleged combination and/or conspiracy to which all the "respondents" were or are asserted parties; that the report itself does not purport to find the fact as to whether such a combination and/or conspiracy had or has any existence in fact (see Report, Paragraphs 166, page 63 and 229, page 88); that until the existence of and the participants in such alleged combination and/or conspiracy are found and declared, at least preliminarily, no act, conduct, omission or declaration of any one respondent is either admissible against or binding upon ~~any~~ other respondent. The vice of the use of the generic term "respondents" is simply this: That before the acts, conduct, omissions or declarations of the alleged conspirators are admissible

against or binding upon their alleged co-conspirators, the fact of the existence of the alleged combination or conspiracy must first be shown by evidence and this fact, in turn must be determined from the standpoint of presumed innocence, not of guilt, even in civil cases. That is to say, the individuals accused must be viewed as individuals and not as assumed partners in an opprobrious enterprise, the very existence of which is the primary issue. Hence, since the report specifically omits (as is of course proper) any collective characterization of the acts, conduct, omissions and declarations of the numerous respondents, it should, in equal propriety and as a matter of substantial rights of the respondents, also report the acts of the various individual respondents as individuals and leave to the Commission the determination of the ultimate issue. The failure of the report to do this is therefore not only excepted to by Riverside upon the grounds and for the reasons in this paragraph stated, but is also assigned by it as error prejudicial to its rights.

Exception No. 2. Exception is hereby made, both generally and specifically, to any and all of the citations of evidence set forth in the report and in each and every part or paragraph thereof dealing with the acts, conduct, omissions or declarations of respondents other than Riverside, as distinguished from those of Riverside itself, and as well to the use by the Commission of any of said citations in connection with the issue presented in this proceeding as to (a) whether or not there was or is in fact a combination and/or conspiracy as alleged in the complaint and in each of the two counts thereof, and (b) whether or not if such combination and/or conspiracy had any existence in fact Riverside is or ever was a party thereto or participant therein. The specific ground of this exception may be stated as follows: The act or declaration of an alleged conspirator against an alleged co-conspirator and relating to the conspiracy may only be considered as evidence against such alleged co-conspirator *after proof of the conspiracy and not before.*

Exception No. 3. Exception is taken to the failure of the footnote on page 9 of the report, or of the report as a whole, or of any part or portion thereof, to specify what policies or practices of the industry or of the Cement Institute, as distinguished from its own policies or practices, Riverside is allegedly connected with by any of the

citations of evidence following or set forth in Paragraph 61, page 23. (See also exceptions to Paragraph 82.)

Exception No. 4. Exception is taken to the footnote on page 9 insofar as the same states or implies that any of the citations following or set forth in Paragraph 61, page 23 refer to some or any evidence connecting Riverside with either the policies or practices of the industry or of the Cement Institute, as distinguished from its own policies and practices. The facts as to Riverside's membership and the nature and extent of its participation in the affairs of the Institute are hereinafter set forth. (See also exceptions to Paragraph 82.)

Paragraph 61. Riverside Cement Company.

Exception No. 5. Exception is taken to the failure to report (Paragraph 61, page 23) the following evidence concerning the history and organization of Riverside:

(a) The Crestmore mill is located 56 miles east of the City of Los Angeles. The Oro Grande mill has not been in operation since 1928. The capacity of the former mill is about 3,600,000 bbls. annually, and of the latter about 1,500,000 bbls. Both of these figures have their basis in actual production over a fractional part of a year. (Tr. 8973-76; 42869.)

(b) None of the officers or directors of the Riverside Company are officers or directors of any other cement company. Except for matters in connection with some bids submitted by Riverside and other Southern California companies jointly, Riverside has had no business contacts with any of the other respondents in this proceeding. (Tr. 42868; 42877.)

(c) Riverside sells its cement in Southern California, in the southern portion of the San Joaquin Valley in California, in the State of Arizona, primarily in an area bounded on the east by Tucson and Phoenix, and in Southern Nevada. Sales in the latter state are confined primarily to the area around Las Vegas. Riverside also ships negligible quantities of its product to Hawaii. (Tr. 8977-78; 42869; 42874-75.)

(d) Only 6% of Riverside's total sales are to buyers in states other than California. In California its principal market is Southern California and its main sales centers in Southern California are Los Angeles and San Diego.

Riverside's principal competitors are California Portland Cement Co., Southwestern Portland Cement Co., Monolith Portland Cement Co., Santa Cruz Portland Cement Co., and the Blue Diamond Corporation. (Tr. 42869-70; 42874-75.)

Exception No. 6. Exception is taken to the failure to report (61-23)* the following evidence concerning Riverside's membership in the Cement Institute:

(a) Riverside joined the Institute on June 15, 1933 in order to have a voice in the formulation of an NRA Cement Code pursuant to N. I. R. A. It was not a member at any time prior to the cancellation of the Institute's Code of Ethics. (Resp. Exs. 2173-B-C; 2174-C; Tr. 16699; 16927-29; 42877.)

(b) Both during the NRA Code period and after, Riverside was primarily if not solely interested in the work of the Institute's Marketing Research Committee. John Treanor, its former president, now deceased, was a member of this Committee and devoted his best efforts to acquainting the Federal Trade Commission with the marketing problems of the cement industry from the manufacturers' standpoint in the hope that a constructive program satisfactory to the Commission could be worked out. (Tr. 42877.)

(c) Since Treanor's death in 1935, Riverside has not been represented on the Committee and has taken no part in any Institute activity. (Tr. 42877-78.)

(d) Riverside has never received or used freight rate books published by the Institute. (Tr. 42879-80.)

(e) At no time has the Institute had anything to do with the formulation or carrying out of any of Riverside's business and sales policies or practices. (Tr. 42878.)

Exception No. 7. Exception is taken to the failure to report (61-23) that, as against the two cases of identical bidding reported, there were in evidence some 907 bids of Riverside to governmental, state or municipal bodies as to which no claim or assertion of identical bidding is made in this proceeding. (Tr. 42879; Resp. Ex. 3450-A-Z-10.)

Exception No. 8. Exception is taken to the failure to report (61-23) that Riverside participated in none of the identical bids referred to in Paragraph Six of the complaint herein, nor are the same illustrative of Riverside's

* Denoting Paragraph 61, page 23

marketing methods or practices. In the area in which Riverside markets its cement, non-identical bids are the rule, identical bids the exception. In those instances in which Riverside bids have been identical with those of other companies, Riverside bids were made independently and wholly without any understanding with any other bidder. In the case of joint bids participated in by Riverside, the facts in relation thereto and the reasons therefor have invariably been made known to the public body involved. (Tr. 42879; 42882; Resp. Ex. 3453-A to 3453-S; Com. Ex. 118-A-B; 128-A-B; 131-A-C.)

Exception No. 9. Exception is taken to the statement (61-23) that Riverside made a joint bid with five others on the Boulder Canyon project, on the ground that it is contrary to the evidence. Com. Ex. 134-C (cited in Par. 61) shows on its face that Riverside submitted a bid jointly with three other Southern California companies, that this joint bid was an f.o.b. mill bid, and that two other companies submitted separate f.o.b. mill bids of their own. Com. Ex. 134-D-E, not cited by the Examiner, is the actual bid of the four joint bidders and shows the terms and conditions of the joint bid and the reasons therefor in the public interest.

Exception No. 10. Exception is further taken to the implication (61-23) that the joint bid of the Southern California companies was identical with the bids of the other two bidders. This is contrary to the evidence. (Com. Ex. 134-C-G.)

Exception No. 11. Exception is taken also to the failure to report (61-23) the evidence that in such and in each and every joint bid in which Riverside has ever participated, the facts in connection therewith and the reasons for making the bid in joint form were fully disclosed to the public agency involved and that in connection with the joint bid on the Boulder Dam project, an opinion of the Comptroller General of the United States was sought; and that his opinion was that a bid in such form was not objectionable. (Resp. Ex. 3619-A-C; Tr. 1341-43; 42876-77; 42883-84.)

Exception No. 12. Exception is taken to the failure to report (61-23) that the Navy Department invitations to bid to which Riverside's bids of June 9, 1931 and June 26, 1934 (cited in Par. 61) were a response, called for bids f.o.b. destination only. (Com. Ex. 378-Y; 381-Y.)

Exception No. 13. Exception is taken to the failure to report (61-23) the following evidence regarding Riverside's bidding policies and practices:

(a) It has been Riverside's experience that governmental agencies, state or federal, unless they have available to them land grant or special rates, request prices and deliveries f.o.b. destination. Where such land grant or special rates have been available to the agency involved, Riverside has always quoted mill prices and has given to the agency the opportunity to take delivery at mill for shipment on government bills of lading. It is Riverside's policy to cooperate with public agencies to the end that the full benefit of the land grant or special rates may be secured to the agency. The evidence is that Riverside has not, either by use of a so-called "control clause" or otherwise, prevented the Federal government or any public agency from realizing the full benefit of the land grant, special, or reduced rate available. (Tr. 322-23; 1366-67; 9026; 9210-11; 10234-36; 10270-71; 42875; 42880-83; Com. Ex. 118; 129; 134; 135; 1303; 1339; 3261-i, n, s; Resp. Ex. 124; 290; 292; 297; 302; 384; 3443; 3444-A-Z10; 3453-A-C; 3691-A-C; 3692; 3784; 3785.)

(b) Many of Riverside's f.o.b. mill bids to governmental authorities have been made without giving consideration to land grant or special rates that might be involved in shipping cement from Riverside's mill and mills of competitors. On these bids Riverside's cost to the Government at destination was sometimes lower and sometimes higher than those of its competitors. (Tr. 9027-32.)

(c) Riverside attempts to ascertain what land grant or special rates are available to governmental agencies from its own and from competing mills in order that it may have some idea of what comparative costs to the agency at destination are likely to be. It secures and uses information with regard to these rates from the railroads and from government offices. (Tr. 9027-28; 9099-104; 9210-11; 42,878.)

Exception No. 14. Exception is taken to the failure to report (61-23) the following evidence with regard to Riverside's pricing policies and practices:

(a) It is Riverside's general practice to sell its cement on a delivered price basis. None of Riverside's customers, except those to whom there is some saving available

in the cost of transportation, ever request prices or deliveries other than f.o.b. destination. So far as customers to whom savings in transportation costs are available are concerned, Riverside makes deliveries to them at mill at f.o.b. mill prices. (Tr. 42872-73; 42880; see also Exception No. 5 and citations, supra.)

(b) Riverside has at all times followed an open price policy. It has always published lists of its current delivered prices and distributed them widely. (Tr. 8978-79; 42875; Com. Ex. 1203-O-P; 1205-D-J; 1295-A-9-R; 1978; 1979; 1981; 1983; Resp. Ex. 108; 3454.)

(c) Riverside determines the delivered prices it quotes in its sales area by reference to its current price list or by meeting competitive prices picked up in the field by its salesmen. In either case, it quotes its prices wholly without reference to or use of the factors of base price and rail freight. In quoting its prices, Riverside makes no use of any formula of base price and rail freight. (Tr. 9082-84; 42879.)

(d) When Riverside Portland Cement Co., the predecessor of the present Riverside Company, went into operation in 1910, the cement being offered on the Los Angeles market was foreign cement and cement from Northern California and from Kansas. The Los Angeles price at that time which had been established by the Northern California mill was $2.00 per bbl. Prices to communities around Los Angeles were arrived at by adding rail freight to the $2.00 price. Gradually Kansas mills withdrew from the market. This method of pricing continued until about 1917, when the War Industries Board designated Riverside's Crestmore mill as the basing point for the Southern California territory. Thereafter during the war period, maximum emergency prices at Los Angeles and in Southern California were fixed by the War Industries Board as the Crestmore base plus freight. Riverside's price lists reflected a policy of basing on Crestmore until about 1927, when, due to the activity in the Los Angeles metropolitan area and to the prevalence of local trucking of cement, it became impractical to observe disparities in prices reflecting rail freight differentials between nearby or adjacent communities. The Los Angeles metropolitan district consisted at that time and still consists of numerous contiguous communities to many of which a different rail rate from Crestmore was applicable. Rail rates as between different destinations within this area

varied so that a dealer located in one community, under base plus freight, was required to pay a higher price for his cement than one in an adjacent community. The result was that the former could not compete with his more advantageously situated neighbor. Riverside was besieged by complaints from these disadvantageously located dealers and in order to allow them to compete on an equal basis with other dealers within the area, Riverside in 1927 issued a new price list for the area which inaugurated a zone method of pricing. This method over the years has gradually spread throughout the whole of Southern California. These prices bear no relation whatever to mill nets and freights. (Tr. 8785-87; 9067-74; 9083-84; 40870-74.)

(e) In quoting prices outside the State of California, Riverside either quotes the prices it finds its competitors quoting at the destinations at which it sells cement or quotes lower prices. These prices are included in its price lists. (Tr. 8985-87; 42873-74; 42875.)

(f) Riverside tries to have its price lists accurately reflect its opinion of what the market prices are. It has always found that all of its competitors at times sell at prices lower than the ones appearing in Riverside's cement price list. When such is the case, Riverside meets the competitive prices. When it appears to Riverside that its list no longer reflects current prices, it issues a new list. (Tr. 8985-87; 9039.)

(g) Riverside always meets price reductions instituted by its competitors. Otherwise it could not sell its cement. As to price increases instituted by competitors, it regards it as optional as to whether or not it will follow, dependent on its judgment of general market conditions, its views as to probable consumer reaction and the threat of competitive materials. Riverside itself has instituted price changes whenever in its judgment its current published price list does not generally reflect prices at which its product will sell. Riverside has instituted numerous price changes. These have included a price increase in November of 1935 which its competitors did not follow, thus forcing Riverside to recede to a lower price. (Tr. 8995-9003; 9034-37; 42875-76; Resp. Ex. 3451-52.)

Exception No. 15. Exception is taken to the failure to report (61-23) the following evidence regarding trucking policies of Riverside:

(a) Riverside has sold cement for truck delivery since

1926. In that year it established a price at its mill for shipments picked up by truck. It has not, in recent years, charged a premium at its mill for delivery to trucks. (Tr. 42880.)

(b) Riverside also maintains a fleet of trucks of its own in which it makes deliveries at its current destination prices. The cost of such deliveries is about the same as the cost of rail delivery. (Tr. 9067-68; 42880.)

(c) The movement of cement by trucks from the Crestmore mill has constantly increased since 1926 so that at the present time, deliveries by this means constitute 92% of the total. (Tr. 42880.)

Exception No. 16. Exception is taken to the failure to report (61-23) that the evidence is that Riverside's practices and policies with regard to its dealers, and terms of sale and discount, have at all times been independently arrived at. (Tr. 42880-82; Resp. Ex. 108; 3454; Com. Ex. 1203-O-P; 1205-D-H; 1295-B-C; 2B, 2D, 2Q, 2T, 3F, 3H, 3-U, 3-V, 4E, 4L, 4P, 4U, 4X, 4Z, 5E, 5o, 5R, 6I, 6o, 6U, 6X, 7I, 7K, 7M, 7P, 8A, 8C, 8D, 8J-8N, 8T, 8V, 8Y, 9J, 9L-9M; 1978; 1979; 1981; 1983.)

Paragraph 82. Alleged Group Activities.

Exception No. 17. Exception is taken to the unsupported implication suggested by Paragraph 82, page 29, and the footnote to page 9, that Riverside is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited.

Exception No. 18. Exception is further taken to the unsupported assertion in Paragraph 82, page 29, and the footnote to page 9 that Riverside is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

Exception No. 19. Exception is taken to the failure to report (in paragraph 82, page 29, paragraph 61, page 23, or elsewhere) (a) that the president and the vice president and general manager of Riverside appeared as witnesses

on its behalf and testified fully regarding the practices and policies of Riverside as well as their history and development, and (b) that the practices and policies of Riverside were adopted independently and that none of them was or is the result of understanding or agreement with competitors. (Tr. 8972, et seq.; 9033, et seq.; 9194, et seq.; 42865, et seq.)

Exception No. 20. Exception is taken to Paragraph 82, page 29, insofar as the same states or implies that any of the references to Riverside set forth in Paragraph 61, page 23 contain or set forth some of the or any facts which go to identify or which do identify Riverside either with the or any activities of the Institute aside from the facts hereinabove set forth as to Riverside's membership in and the nature and extent of its participation in the affairs of the Institute.

Exception No. 21. Exception is further taken to the failure of Paragraph 82, page 29, or of the report as a whole, or any part or portion thereof, to specify what "activities" or "group activities" of the industry or of the Institute, as distinguished from its own activities in the ordinary course of conduct of its own business affairs, Riverside is allegedly identified with by any of the citations of evidence following or set forth in Paragraph 61, page 23.

Paragraphs 88-92. The Basing Point System.

Exception No. 22. Exception is taken to Paragraphs 88-92 (pages 31-32), and each of them, both inclusive, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 23. Exception is taken to the failure to report in Paragraphs 88-92 that the multiple basing point system, as described in the complaint and as referred to in said Paragraph 88, is not and has not been used or employed by Riverside or in the area where Riverside markets its cement within the period of time specified in the complaint.

Exception No. 24. Exception is taken to the failure to report in Paragraphs 88-92 as follows: In Southern California commercial prices are quoted by price-lists with reference to zones circumscribing urban or groups of urban areas. In out-state shipments, Riverside's policy

is to quote on a mill-net plus freight basis, except where competition forces a lower price, as in the case of a competitor having a freight advantage. On public bids, Riverside bids f.o.b. mill or otherwise, as the invitation prescribes. (Tr. 42879; 42872-4; 9027-9032; 9196; 9207; 9211; 42875; 42880-81; 42873; Resp. Ex. 3450-A-Z-10; Comm. Ex. 1297.)

Exception No. 25. Exception is taken to the failure to report in Paragraphs 88-92 that Riverside has for years fixed and determined its prices by the price-list method and not by the so-called basing point method. (Tr. 42879.)

Exception No. 26. Exception is taken to the failure to report in Paragraphs 88-92 that delivered cement prices in the area served by Riverside are determined (a) by reference to the current price list, or (b) by information picked up in the field by salesmen; in either case wholly without reference to or use of the factors of base price and all-rail freight. In quoting or changing its prices, Riverside makes no use of such a formula as the prevailing price at the governing basing point plus an all-rail rate of freight therefrom to the location of the customer. (Tr. 42879.)

Exception No. 27. Exception is taken to the citation of Transcript 9125 in support of the matters set forth in Paragraph 89, since the reference in question is to incompetent hearsay without proper or any foundation laid so far as Riverside is concerned. (Tr. 9123.)

Exception No. 28. Exception is taken to the facts reported in Paragraph 92, in addition to those exceptions heretofore stated as to Paragraphs 88-92, both inclusive, upon the ground that the same are without support in the evidence as far as Riverside is concerned. (Citations supra.)

Paragraph 93. Prevailing Trade Conditions.

Exception No. 29. Exception is taken to Paragraph 93 (p. 33) upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 30. Exception is taken as to the facts reported in Paragraph 93; in that the same are without support in the evidence insofar as Riverside is concerned.

Exception No. 31. Exception is taken to the implication of nationwide identity of prevailing trade practices and

conditions at a given time found in Paragraph 93, in that the evidence is exactly to the contrary. (Record.)

Paragraphs 94-103. Identical Bidding.

Exception No. 32. Exception is taken to Paragraphs 94-103, both inclusive (pages 34-38), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 33. Exception is taken to Paragraphs 94-103, both inclusive, and each of them, of said report, in that the same are without support in the evidence so far as Riverside is concerned. (Report, Par. 6, p. 33, Resp. Ex. 3450A-Z-10; Tr. 42879.)

Exception No. 34. Exception is taken to the failure of the report to set forth in Paragraphs 94-103, that only two instances of identical bidding by Riverside are reported to the Commission, as against 907 public bids by Riverside in evidence. (Rep. Par. 61, p. 23, Resp. Ex. 3450A-Z-10.)

Exception No. 35. Exception is taken to Paragraphs 95-103 (pages 34-38), both inclusive, and each of them, upon the ground that said paragraphs and each of them report acts and conduct on the part of other respondents not show in any way or by any evidence to be connected with respondent Riverside. (Record.)

Paragraphs 104-113. Involuntary Basing Mills.

Exception No. 36. Exception is taken to Paragraphs 104-113, both inclusive (pages 38-41), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 37. Exception is taken to said Paragraphs 104-113, both inclusive, and each of them, in that there is no evidence in the record connecting Riverside with any of the acts or conduct reported in said paragraphs, or any of them. (Record.)

Exception No. 38. Exception is taken to said Paragraphs 104-113, both inclusive, and each of them, upon the ground that said paragraphs and each of them report acts and conduct on the part of other respondents not shown in any way or by any evidence to be connected with respondent Riverside. (Record.)

Paragraphs 114-119. Institute Rate Books.

Exception No. 39. Exception is taken to Paragraphs 114-119, both inclusive, (pages 41-44), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 40. Exception is taken to the failure to report, in Paragraphs 114, 116-119, both inclusive (pages 41-44), that the Institute freight rate books have never been used in the area in which Riverside markets its cement. (Tr. 42879-80.)

Exception No. 41. Exception is taken to Paragraphs 114-119, both inclusive, and each of them, upon the ground that said paragraphs and each of them report acts and conduct on the part of other respondents not shown in any way or by any evidence to be connected with respondent Riverside. (Record.)

Exception No. 42. Exception is taken to said Paragraphs 114-119, both inclusive, and each of them, in that there is no evidence in the record connecting Riverside with any of the acts or conduct reported in said paragraphs, or any of them. (Record.)

Paragraphs 120-122. Trucking.

Exception No. 43. Exception is taken to Paragraphs 120-122, both inclusive (pages 44-46), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 44. Exception is taken to the failure to report in Paragraphs 120-122 that Riverside has for years sold f.o.b. trucks at mill without premium and that at the present time approximately 92% of its deliveries are made by truck. (Tr. 42880.)

Exception No. 45. Exception is taken to the report in Paragraph 122 (p. 45) that trucking is prohibited or discouraged by most of the Western respondents to the extent that such term "Western respondents" includes Riverside. (Tr. 42880.)

Paragraphs 123-129. Diversions.

Exception No. 46. Exception is taken to Paragraphs 123-129, both inclusive (pages 46-48), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 48. Exception is taken to said Paragraphs 123-129, both inclusive, and each of them, in that there is no evidence in the record connecting Riverside with any of the acts or conduct reported in said paragraphs, or any of them. (Record.)

Exception No. 49. Exception is taken to the failure to report in Paragraphs 123-129 that the policy of Riverside is opposed to diversion of shipments for the following reasons:

(a) A concession and delivered price arising from such a diversion as that mentioned in the complaint (Subdivision (c) of Paragraph Seven) would be an improper and illegal discrimination in price in favor of a transferee therein mentioned.

(b) On sales where delivery to a given job is specified, a diversion would lead to a loss of Riverside's materialman's lien rights on such job. Expensive investigation, tracing and proof would then be required in order to reestablish such lien rights. (Tr. 42880.)

Paragraphs 130-138. F.O.B. Mill Prices.

Exception No. 50. Exception is taken to Paragraphs 130-138, both inclusive (pages 48-51), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 51. Exception is taken to Paragraphs 130-138, both inclusive, and each of them, upon the ground that said paragraphs and each of them report acts and conduct on the part of other respondents not shown in any way or by any evidence to be connected with respondent Riverside. (Record.)

Exception No. 52. Exception is taken to said Paragraphs 130-138, both inclusive, and each of them, in that there is no evidence in the record connecting Riverside with any of the acts or conduct reported in said paragraphs, or any of them. (Record.)

Exception No. 53. Exception is taken to the failure to report, in Paragraphs 130-138, that it is and always has been Riverside's practice on sales to governmental agencies for ultimate use within and without the State of California to permit the government to take delivery at the mill and ship on government b/l of lading at the land grant or any other special or reduced rate which may be applicable. (Respondent's Exhibit No. 3450A Z-19 instances 307 illustrations of this practice on sales to public bodies.) (Tr. 42875; 9210-11.)

Exception No. 54. Exception is taken to the failure to report in Paragraphs 130-138 that Riverside does not, either by the use of a "control clause" or otherwise, prevent the government or any public agency from realizing the full benefit of any available land grant or other special or reduced rate. (Tr. 42881.)

Exception No. 55. Exception is taken to the failure to report in Paragraphs 130-138 that Riverside has frequently bid f.o.b. mill (which means f.o.b. cars at mill), independent of any consideration as to the application of land grant or other freight rates. (Tr. 9027, et seq.)

Paragraphs 139-146. Dealer Definition and Policy.

Exception No. 56. Exception is taken to Paragraphs 139-146, both inclusive (pages 51-56), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 57. Exception is taken to Paragraphs 139-146, both inclusive, and each of them, upon the grounds and for the reasons specified in Exceptions Nos. 37 and 38.

Exception No. 58. Exception is taken to Paragraphs 139-146, both inclusive, and each of them, upon the grounds and for the reasons stated in Exception No. 16.

Paragraph 147. Confining Sales to the Dealer's Locality.

Exception No. 59. Exception is taken to Paragraph 147 (page 57) upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 60. Exception is taken to Paragraph 147 upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 148-150. Uniform Terms and Discounts.

Exception No. 61. Exception is taken to Paragraphs 148-150, both inclusive (pages 57-58), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 62. Exception is taken to Paragraphs 148-150, both inclusive, and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 63. Exception is taken to Paragraphs 148-150, both inclusive, and each of them, upon the grounds and for the reasons stated in Exception No. 16.

Paragraphs 151-158. Imported Cement and Zone Prices.

Exception No. 64. Exception is taken to Paragraphs 151-157, both inclusive (pages 57-58), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 65. Exception is taken to Paragraphs 151-157, both inclusive, and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 66. Exception is taken to the failure to report in Paragraphs 151-157 that no appreciable quantity of foreign cement has been imported to Riverside's sales area for over ten years. (Tr. 42882.)

Exception No. 67. Exception is taken to the implication contained in Paragraph 158 (p. 60) that the quotation and observation of freight prices for entire areas by "respondents," regardless of the exact cost of transportation, was or is a nation-wide and uniform practice, in that the evidence is exactly to the contrary. (Record.)

Exception No. 68. Exception is taken to the report in Paragraph 158 that the quotation and observation of flat prices facilitated price matching by manufacturers in such areas, in that the same is a wholly unwarranted conclusion without support in the evidence. (Tr. 42872; 42874.)

Exception No. 69. Exception is taken to the failure to report in Paragraph 158 that Riverside markets its cement by the price list method and not by the so-called "regular price basing methods" referred to in said paragraph. (Tr. 42875-6; 42978-79.)

Paragraphs 159-160. Maintaining the Institute.

Exception No. 70. Exception is taken to Paragraph 159 (p. 60) on the ground that the same is without support from the evidence so far as Riverside is concerned, except to the extent indicated by the facts set forth in and as a part of Subparagraphs (a), (b), (c), (d) and (e) of Exception No. 6 hereinabove set forth, and except that Riverside did pay its dues to said Institute as in the case of other members. (Tr. 42877-8.)

Exception No. 71. Exception is taken to the failure to report in Paragraph 159 each and all of the facts stated in Subparagraphs (a), (b), (c), (d) and (e) of Exception No. 6.

Exception No. 72. Exception is taken to the statement contained in Paragraph 159 that the Institute was an "agency" common to all respondents or of Riverside, and to the failure in lieu thereof to report that the functions of the Institute were limited to carrying out the purposes specified in its articles of incorporation.

Exception No. 73. Exception is taken to the statement in Paragraph 159 that the effect of the Institute's activities as specified in said paragraph, or any of them, went directly to the policies of the various respondents or of Riverside, or tended to induce uniformity of price or method, in that the same is an unwarranted conclusion which is unsupported by and contrary to the evidence. (Tr. 42877; 42878.)

Exception No. 74. Exception is taken to the statement contained in Paragraph 160 (p. 61) that "there is much testimony in many exhibits, cited elsewhere herein, going to the aforesaid activities and others which necessarily involved the establishing of the affecting of policies," upon the following grounds, and each of them:

(a) Upon the grounds and for the reasons set forth in Exceptions Nos. 1 and 2;

(b) Upon the grounds and for the reasons set forth in Exceptions Nos. 37 and 38; and

(c) That the statement in question is an unwarranted conclusion which is without support from and contrary to the evidence so far as Riverside is concerned. (Tr. 42877; 42878.)

Paragraphs 161-162. Propaganda Re the Pricing System.

Exception No. 75. Exception is taken to Paragraphs 161-162, both inclusive (pages 61 and 62), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Paragraph 163. Dual and Area Bases.

Exception No. 76. Exception is taken to the failure to report in Paragraph 163 (p. 62) that the reason for the so-called dual base at El Paso was the competition of the Southern California mills, including Riverside, which resulted in lower prices in Arizona than in the area affected by the higher price. (Tr. 32327.)

Exception No. 77. Exception is further taken to the use in Paragraph 163 of the expression "Colton-Crestmore California Group" in that said expression is not only an anachronism but is inaccurate and misleading. The evidence is that the freight rates from Colton and Crestmore have for years borne no relationship whatever to the prices listed in and for the zones in California, and that on the other hand the commercial freight rates from all four of the Southern California mills to Arizona points are, with unimportant exceptions, the same. (Tr. 8934-35; 8885-6; 8959; 9082-84.)

Paragraph 164. Price Leadership.

Exception No. 78. Exception is taken to Paragraph 164 (p. 62) upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraph 165. Price Rigidity.

Exception No. 79. Exception is taken to Paragraph 165 (p. 63) upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 166-168. Agreements, Understandings, and Communications.

Exception No. 80. Exception is taken to the second subparagraph of Paragraph 166 (p. 63) on the ground that as to Riverside the statements therein contained are contrary to the evidence (except one, membership in the Institute). (See citations in Exceptions Nos. 5-16.)

Exception No. 81. Exception is further taken to the failure to report in Paragraph 166 that Riverside did not participate in the "various" biddings heretofore shown; that only two identical bids by Riverside are reported to the Commission as against some 907 bids in evidence; that there is no evidence warranting any inference that such identical bids were in any manner collusive; that Riverside initiated on its own volition the zoning of areas in Southern California and the listing of prices with reference to such zones; that the Institute freight rate books have never been used in the area in which Riverside markets its cement; that there is no evidence whatever that any attendance by any representative of Riverside at any Institute meeting resulted in or was reflected in any conformity in policies on the part of Riverside, either with regard to dealers, truckings, diversions or otherwise; and that there is no evidence that Riverside ever conformed to any dealers, trucking, diversion or other policies other than its own. (See citations set forth in Exceptions Nos. 5 to 16, both inclusive; also Tr. 8952-53; 9034-37.)

Exception No. 82. Exception is taken to the statement contained in the second subparagraph of Paragraph 166 to the effect that the report sets out conditions and practices on the part of Riverside shown to have prevailed and from which inferences as to collusion, agreement, concerted action or mutual understanding may allegedly be drawn, in that the same is contrary to the evidence. (See citations set forth in Exceptions Nos. 5 to 16, both inclusive.)

Exception No. 83. Exception is taken to Paragraphs 167-168 (pages 64-65), both inclusive, and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 84. Exception is also taken to Paragraphs 167-168 upon the ground that the facts therein

reported are too remote in period of time to prove or disprove any issue in the present proceeding.

Paragraphs 169-170. License Agreement Association.

Exception No. 85. Exception is taken to Paragraphs 169-170, both inclusive (p. 65), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 86. Exception is also taken to Paragraphs 169-170 upon the ground that the facts therein reported are too remote in period of time to prove or disprove any issue in the present proceeding.

Paragraphs 171-177. Other Organization Activities.

Exception No. 87. Exception is taken to Paragraphs 171-172 (pages 65-66), both inclusive, and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 88. Exception is also taken to Paragraphs 171-172 upon the ground that the facts therein reported are too remote in period of time to prove or disprove any issue in the present proceeding.

Exception No. 89. Exception is further taken to the failure to report in Paragraph 172 that Riverside was never a member of the Cement Manufacturers Protective Association.

Exception No. 90. Exception is taken to Paragraph 173 (p. 66) upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 91. Exception is further taken to Paragraph 173 on the ground that Riverside did not become a member of the Cement Institute until June 15, 1933, as reported in Paragraph 61, page 23.

Exception No. 92. Exception is taken to the failure to report in Paragraph 174 (p. 66) that Riverside prefers to use information regarding land grant rates obtained by itself from the railroads involved rather than to use the information disseminated by the Pacific Coast Cement Institute; that the land grant rate service of the Pacific

Coast Cement Institute is not nor never was of any value to Riverside because it was not used to any extent; that at no time did the Pacific Coast Cement Institute have anything to do with the formulation or carrying out of Riverside's business or sales policies or practices. (Tr. 9100-04; 9204-10; 42878.)

Exception No. 93. Exception is taken to the failure to report in Paragraph 174 that there is no evidence that any activity or activities of the Pacific Coast Cement Institute, or of Riverside in connection therewith, or as a member thereof, resulted in or brought about or tended to bring about (a) identical bidding, (b) prevention or discouragement of f.o.b. mill prices, (c) price rigidity, (d) use of a control clause, or (e) the deprivation to the government or other public agencies of the benefits of land grant or other special rates. (Tr. 42878-81. See also citations to Exceptions No. 5-16; 92.)

Exception No. 94. Exception is taken to Paragraphs 175 and 177 (p. 67), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 95. Exception is taken to the failure to report in Paragraphs 175, 176 or 177, or any of them, that at no time did the Portland Cement Association have anything to do with the formulation or carrying out of Riverside's business or sales policies or practices. (Tr. 42879.)

Paragraphs 178-183. Various Cooperative Activities.

Exception No. 96. Exception is taken to Paragraphs 178-181, both inclusive (pages 68-69), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 97. Exception is taken to the failure to report in Paragraphs 181-182 (p. 69) that Riverside believes in and follows open price policy. It has been and is its practice to mail its price lists to dealers, secretaries of dealer associations, California cement companies including its competitors, public purchasing agents and railroads. (Tr. 42875.)

Exception No. 98. Exception is taken to the failure to report in Paragraph 182, in lieu of the first clause in the last sentence of said paragraph, the following: "These lists contain prices which figure back to a given mill net

at the seller's mill in some instances." (See citations to Exception No. 24.)

Exception No. 99. Exception is taken to the statement contained in Paragraph 183 (p. 70) to the effect that prices generally on the Pacific Coast are identical delivered prices, on the ground that the same is misleading, confusing, unsupported by and contrary to the evidence. (Tr. 42873, 42875; 9210-11; 8894; 8903-4; 8997; 9035-7.)

Exception No. 100. Exception is further taken to the statement contained in Paragraph 183 that the multiple basing system is in use except in the zones, on the ground that the same is contrary to the evidence. (See citations to Exception No. 24.)

Exception No. 101. Exception is further taken to the statement contained in Paragraph 183 that terms on the Pacific Coast are uniform, in that the same is unsupported by evidence. (See citations to Exception No. 16.)

Exception No. 102. Exception is taken to all portions of Paragraph 183 other than those above referred to upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 184-187: The Cree Incident.

Exception No. 103. Exception is taken to Paragraphs 184-187, both inclusive (pages 70-71), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 188-195: Opposing New Mills.

Exception No. 104. Exception is taken to Paragraphs 188-194, both inclusive (pages 71-73), and each of them, upon the grounds and for the reasons stated in exceptions Nos. 37 and 38.

Exception No. 105. Exception is taken to the failure to report in Paragraph 189 (p. 72) that the participation of John Treanor, then President of Riverside, in the TVA Cement negotiations arose solely out of the fact that he was an old friend of Dr. Arthur E. Morgan; that he met Dr. Morgan on this basis and entirely by chance and it was under these circumstances that the matter was first called to his attention by the latter, whereupon Treanor

arranged a meeting between some industry men and Dr. Morgan; and that Riverside was not a bidder on the TVA requirements, it being some 2,000 miles outside the bidding territory. (Tr. 1978.)

Exception No. 106. Exception is taken to the statement in Paragraph 195 (p. 73) that John Treanor, Riverside, was shown to be active in "this opposition work" at various times. Treanor participated in the TVA matter on a friendship basis and in order to assist in working out the problem which Dr. Morgan called to his attention. There was neither discussion nor thought about TVA constructing a mill of its own at the inception of Treanor's activities in the matter. This possibility, it is clear from the evidence, was used by Dr. Morgan as a lever for obtaining a lower price for cement for use in connection with TVA's activities. (Tr. 1978; 1982-87.)

Exception No. 107. Aside from the matters specified in the last preceding exception, exception is taken to Paragraph 195 on the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraph 196. Collective Bidding.

Exception No. 108. Exception is taken to the failure to report in Paragraph 196 (p. 73) each and all of the facts stated in support of the exhibits and evidence referred to in Exceptions Nos. 7, 9 and 11.

Paragraphs 200-201. Price Filing.

Exception No. 109. Exception is taken to Paragraph 200 (p. 75) upon the grounds and for the reasons stated in Exceptions Nos. 1 and 2.

Exception No. 110. Exception is taken to Paragraph 200 upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 111. Exception is taken to Paragraph 201 (p. 75) on the ground that the same is unsupported by the evidence so far as Riverside is concerned.

Exception No. 112. Exception is further taken for the failure to report in Paragraph 201 that Riverside did not file any prices with the Trade Practice Committee after the Schechter decision. (Tr. 8994-95.)

Paragraphs 202-203. Contract checking.

Exception No. 113. Exception is taken to Paragraphs 202-203, both inclusive (pages 75-76), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraph 204. Returned Sack Allowances.

Exception No. 114. Exception is taken to Paragraph 204 (p. 76) upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 205-206. Reciprocal Shipments.

Exception No. 115. Exception is taken to Paragraphs 205-206 (p. 78), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 207-211. Standardization of Product.

Exception No. 116. Exception is taken to Paragraphs 207-211, both inclusive (pages 78-80), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraphs 212-219. Production and Shipment Statistics.

Exception No. 117. Exception is taken to Paragraphs 212-219, both inclusive (pages 80-83), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Exception No. 118. Exception is taken to the failure to report in any of said Paragraphs 212-219, both inclusive, that Riverside was never a subscriber to the Mallory Statistic Service referred to in Paragraph 215.

Paragraphs 220-223. Secretive Methods.

Exception No. 119. Exception is taken to Paragraphs 220-223, both inclusive (pages 83-84), and each of them, upon the grounds and for the reasons stated in Exceptions Nos. 37 and 38.

Paragraph 224. Price.

Exception No. 120. Exception is taken to the failure to report in Paragraph 224 (p. 84) the facts stated in subparagraphs (a), (b) and (c) of Exception No. 13 and subparagraphs (a), (b) and (c) of Exception No. 14.

Exception No. 121. Exception is taken to all paragraphs or parts of the report hereinabove excepted to on the grounds and for the reasons stated in Exceptions Nos. 1 and 2 upon the further ground that said paragraphs or parts of said report are unsupported by the evidence so far as Riverside is concerned.

Exception No. 122. Exception is taken to all paragraphs or parts of the report hereinabove excepted to on the grounds and for the reasons stated in Exceptions Nos. 37 and 38 upon the further ground that said paragraphs or parts of said report are unsupported by the evidence so far as Riverside is concerned.

Exception No. 123. Exception is taken generally to any failure to report in accordance with contentions of Riverside, as submitted to the Examiner in the Statement of Contentions of Riverside Cement Company pursuant to the provisions of Rule XXII and heretofore duly filed herein or in accordance with the record evidence cited therein in support of such contentions.

Exception No. 124. Exception is taken generally to each and every part, portion or paragraph of said report specified as excepted to in the Exceptions to Trial Examiner's Report upon the Evidence filed herein by counsel for the respondents represented by Messrs. Donovan, Leisure, Newton & Lumbard, which said exceptions are hereby incorporated herein by this express reference thereto with the same force and effect as if herein set out in full.

Respectfully submitted,

O'Melveny & Myers, and
Pierce Works,
Counsel for Respondent Riverside Cement Company.

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

(Caption 3167)

EXCEPTIONS OF THE SPOKANE PORTLAND CEMENT COMPANY TO THE TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Received Nov. 10, 1941.)

The respondent, Spokane Portland Cement Company, makes the following exceptions to the trial examiner's report upon the evidence:

1. Exception is taken to any implication in Paragraph 66 that the respondent Spokane Portland Cement Company has ever had any connection whatsoever either with the former company of the same name or with the International Portland Cement Company, Limited. This is contrary to the evidence. Exception is further taken to the failure to report that the secretary and treasurer of the respondent Spokane company appeared as a witness on its behalf and that the uncontradicted testimonial and documentary evidence produced by this witness clearly shows the following with respect to the history and organization of his company.

The respondent Spokane company was organized and incorporated under the laws of the State of Washington on February 5, 1937. On about May 5, 1937, it acquired by purchase and became the owner of the property, business and assets of the International Portland Cement Company, Limited. On May 14, 1937, International Portland Cement Company, Limited, instituted proceedings for its voluntary dissolution. These proceedings were terminated on November 29, 1937, when the trustee's certificate of final dissolution was filed in the office of the Secretary of State of the State of Washington. Liquidating dividends were thereafter distributed to stockholders of the International company (Resp. Exs. 3412; 3413; 3418; Tr. 47654; 47656).

Respondent Spokane first became engaged in the production and sale of cement on or about May 5, 1937, when, by virtue of its purchase of the assets, property and business of the International company, it became the owner of one mill located at Irwin, Washington. It retained and employed the same management and personnel previously employed by the International company (Tr. 47657).

2. No exception is taken to the statements in Paragraph 66 with regard to the respondent Spokane company's membership in The Cement Institute except in so far as they imply any relationship with the former company of the same name. Exception is taken, however, to the failure to report that the respondent Spokane has never received or used the Institute freight rate service and has never participated in any of the Institute's statistical services (Tr. 47657).

3. Exception is taken to the citation in Paragraph 66 of Com. Ex. 411F; 967-2J because they do not relate to the bids, policies or practices of the respondent Spokane company (see Exception No. 1, supra).

4. Exception is taken to the failure to report that there is no evidence that respondent Spokane company ever submitted to any governmental agency a bid that was identical with the bid of any competitor. Further exception is taken to the failure to report that on all of its bids in evidence the respondent Spokane quoted f. o. b. mill prices that were not identical with any prices quoted by competitors (Com. Exs. 1339; 1340; Resp. Ex. 350K; 369A-Z; 370A-K; 384A, C; 3692; Tr. 10025; 10267-68; 10272-73; 21793-98). The Trial Examiner rejected further evidence of f. o. b. mill and non-identical bids of the respondent Spokane company (Tr. 21804-07; 21813-16; Resp. Exs. 374 for id.; 376 for id.).

5. Exception is taken to the unsupported implication suggested by Paragraph 82 and the footnote to page 9, and by paragraphs 159 and 160, that respondent Spokane Portland Cement Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute, with any alleged policies or practices of the Institute, or with any "group activities" or industry policies and practices. There is no evidence to support any such implication and none is cited.

6. Exception is taken to the failure to report that the evidence is that the respondent Spokane company has never at any time agreed with anyone to use or employ any particular system or method of pricing or marketing (Tr. 47657).

Dated this 1st day of November, 1941.

Respectfully submitted,

Witherspoon, Witherspoon & Keeley,
Counsel for Respondent; Spokane Portland Cement Company.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

(Caption 3167)

EXCEPTIONS TO TRIAL EXAMINER'S REPORT BY RESPONDENT SUPERIOR PORTLAND CEMENT, INC.

(Received Nov. 10, 1941.)

Comes now the Superior Portland Cement, Inc., through its counsel of record, and herewith presents its exceptions to the Trial Examiner's report.

Preliminary Statement.

The record in this case is so voluminous, and so little of the evidence directly or indirectly relates to or affects this respondent, that we are setting forth the exceptions on behalf of this respondent in two separate sections, believing that so doing will result in a considerable saving of time to the Commission.

In "Class A—Major Exceptions" we have arbitrarily included eleven exceptions. Exceptions 1, 2 and 3 relate to and support the defense that this respondent does not engage in interstate commerce and therefore is not subject to the jurisdiction of the Federal Trade Commission. Exception No. 4 points out that this respondent has never employed the multiple basing point system or any of the methods by which the multiple basing point system is alleged to have been maintained. Exceptions Nos. 5 and 6 point out the fact that this respondent never engaged in identical bidding in response to Government invitations, except during the N. R. A. Code and the twilight period immediately following. Exception No. 7 points out that this respondent never used the Institute freight rate books, which counsel for the Commission charged to be one of, if not the principal, bases upon which the multiple basing point system is made effective. Exceptions Nos. 8, 9 and 10 are taken to establish the fact that this respondent continually bid on an f. o. b. mill basis whenever requested by the Federal Government. Exception No. 11

sets forth that this respondent has never entered into any agreements or conspiracy in restraint of trade with reference to any of the matters set forth in the complaint, either expressly or by inference.

These are grouped as "Major Exceptions" because, if supported by the evidence, as we submit they are, they are complete defense on behalf of this respondent to the principal allegations of the complaint.

Under "Class B—Additional Exceptions" are included a number of important exceptions which point out the difference between the evidence affecting this respondent and the evidence applicable to other respondents negativing, as we submit, any charges of conspiracy. Also included therein are exceptions to findings and citations in support thereof which do not in any manner relate to or affect this respondent and which findings, therefore, are not admissible and should not be considered against this respondent. Finally, as the last exception in Class "B" we have included a general paragraph adopting each and all of the exceptions taken by other respondents. This is done in order to avoid unnecessary duplication and to save the time of the Commission and all counsel concerned.

A—Major Exceptions.

Exception No. 1—Interstate Commerce. Exception is taken to the failure of the Examiner to make a finding that this respondent is not engaged in interstate commerce and that none of the evidence in this case with reference to the marketing, sales and other activities of this respondent related to any transactions in interstate commerce. This respondent does not and has not made any shipments in interstate commerce. Superior Portland Cement, Inc., has sold only two carloads of cement which it subsequently ascertained were shipped to Oregon. The first instance was in 1933 involving the sale of quick strength cement. Superior Portland at first refused to make the shipment since it stated it was not engaged in interstate commerce. The customer advised that it was a rush job requiring a particular type of cement. Rather than inconvenience the purchaser Superior Portland finally made the sale but made delivery f. o. b. car Seattle. The other instance was in 1934 when one of the railroads asked Superior Portland Cement, Inc., for a price on cement f. o. b. Seattle, and Superior Portland quoted a price. A few

weeks later when the shipping instructions came to ship the cement into Oregon, Superior Portland made delivery in Seattle under an invoice f. o. b. Seattle. Superior Portland has not made any sale since 1934 where to its knowledge any of the cement was later delivered to Oregon or any other state of the United States or any foreign country. Superior Portland does make sales of cement which is subsequently shipped to Alaska. Delivery of all such cement, however, is made within the state of Washington at Seattle and all quotations and invoices are upon an f. o. b. Seattle basis, Superior Portland assuming no risks and making no commitments as to deliveries. Furthermore, the volume of sales of cement which is subsequently shipped to Alaska is very small, averaging less than 2% of Superior Portland's total sales. There is no evidence in the entire record of this case relating to sales and marketing practices, policies and methods employed by this respondent in any other state or in the Territory of Alaska or any foreign country, the record in this case with reference to Superior Portland being confined to sales made in intrastate commerce. (Tr. 3226 to 3229 inc.; 8383, 8414, 8434, 8438, 8443, 8444, 8453, 8454, 8461).

Exception No. 2—Interstate Commerce. (See Paragraph 69, p. 25 of the Examiner's report.) Exception is taken to the Examiner's finding that "Superior Portland sold and shipped cement from its said plants in the state of Washington to and into the state of Oregon on f. o. b. billing and ships to Alaska the same way." for the same reasons set forth in Exception No. 1.

Exception No. 3—Interstate Commerce. (See Paragraph 83, p. 29 of the Examiner's report.) Exception is taken to the finding that all of the respondents, except as heretofore affirmatively appears, sell and ship their products in a constant stream of trade and commerce unless this finding be construed not to apply to Superior Portland. (Note that reference is made in this paragraph of the Examiner's report to the answer of Superior Portland. Please refer to Exception No. 1 for citations in support of the allegations of this respondent's answer that it is not engaged in interstate commerce.)

Exception No. 4—Multiple Basing Point System. (See Paragraph 88, p. 31 of the Examiner's report.) Exception is taken to the finding that the multiple basing point

system has been employed by respondents in all trade territory outside of areas or zones of arbitrary or flat prices. There is no evidence in the record to show that this respondent has ever established any basing points. (See the testimony of Gordon Tongue who is the only witness of this respondent who was called to the stand either by the Commission or by the respondent. Tr. 8382 to 8467 inc. and especially Tr. 8391 and 8394 where Mr. Tongue referred to maximum mill net as distinguished from basing point. See also the testimony of Mr. Hollister, President of Northwestern Portland Cement, and Mr. Cameron, Manager of Olympic Portland Cement Company, the only other executives or representatives of cement companies located in western Washington who were witnesses in the case, and both of whom testified as to maximum mill nets and not as to basing points. Tr. 8526, 8531, 8577.) It is obvious, of course, that any marketing company must adopt for itself some method or practice with reference to its own prices. If a company did not have a pricing method or policy, confusion would result in the marketing of its products. As will be noted, infra, the present marketing methods of this respondent are the result of many competitive factors which have caused from time to time changes in such marketing methods. There is no evidence in this proceeding that this respondent either expressly or inferentially ever participated with any other respondent or company in any pricing system, whether a multiple point system or any other system of pricing. In fact, the record shows that this respondent never entered into any such agreement or understanding either oral or in writing. (Tr. 42917) Furthermore, this respondent has never contracted or, nor received nor used freight rate books, contract checking services, credit reporting services or any other special devices which may have been furnished by the Cement Institute and therefore has not used any of these methods or practices which the complaint charges are the methods and practices by which the multiple basing point system is maintained. (Tr. 42895)

Exception No. 5—Identical Bidding. (See Paragraph 69, p. 25 of the Examiner's report.) Exception is taken to the finding that it was involved in identical bidding, for the reason that the only two instances cited by the Examiner were during the code period and the so-called twilight period immediately following the termination of the code

when price filings were still in effect. Except in three isolated instances during the code period or the so-called twilight period immediately following the termination of the cement code the bids of this respondent on Government projects were not identical with other bids. (Tr. 21562, 21563) Respondent's Ex. 264 A to H inc. received in evidence Tr. 21559; Respondent's Ex. 340 A to H inc., received in evidence Tr. 21576; Respondent's Ex. 344 A to L inc., received in evidence Tr. 21580; Respondent's Ex. 345 A to J inc., received in evidence Tr. 21585; Respondent's Ex. 350 A to K inc., received in evidence Tr. 21587; respondent's Ex. 369 A to Z inc., received in evidence Tr. 21796; respondent's Ex. 370 A to K inc., received in evidence Tr. 21798; respondent's Ex. 371 A to K inc., received in evidence Tr. 21801; respondent's Ex. 372 A to W inc., received in evidence Tr. 21801; respondent's Ex. 373 A to M inc., received in evidence Tr. 21803. See also respondent's Ex. 374 A to V inc., 375 A to Z inc., 376 A to ii inc., all identified Tr. 21791. These were rejected by the Examiner as being subsequent to the filing of the complaint herein. For the three isolated instances of identical bidding during the code period and the period immediately following, see Tr. 256; Exhibit 111-F, respondent's Exhibit 1 for identification; Tr. 260, 265, 266, respondent's Exhibit 3 for identification, Exhibits 112-D to 113.) An examination of all of these bids, which are all of the bids in evidence, will show that in every instance during the code period and the period immediately following, respondent Superior Portland submitted non-identical bids. While in commercial dealings with dealers the prices quoted are quite commonly identical with those of competitors in the same market, (Tr. 8395 to 8397) nevertheless the prices quoted by this respondent on commercial business have in many instances been different from those of other respondents. This respondent in a great number of cases, the principal of which were introduced in evidence in this case, continuously has cut its prices for the purpose of securing business from its competitors. (See Tr. 8427-8428, 42918 to 42924, inc.)

Exception No. 6—Identical Bidding. (See Paragraph 94, p. 34 of the Examiner's report.) Exception is taken to the statement contained in this paragraph of the Examiner's report that identical bidding on proposals for the purchase of cement by the United States Government and

others was the outcome of many lettings, upon the same grounds and for the same reasons as stated supra in Exception No. 5.

Exception No. 7—Means Employed—Institute Rate Books. (See Paragraph 114, p. 41 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph of the Examiner's report for the reason that the record affirmatively shows that this respondent did not use the freight rate books of the Cement Institute. (Tr. 42895, 42898) (See also Paragraph 115, p. 42 of the Examiner's report, wherein it was admitted that the freight rate bureau service did not cover the state of Washington and certain other Western states.)

Exception No. 8—F. O. B. Mill Prices. (See Paragraph 130, p. 48 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 130 of the Examiner's report for the reason that the evidence in this case conclusively shows that this respondent has never cooperatively or individually adopted a policy of refusing to quote the Government on an f. o. b. mill basis. This respondent has not used any fixed pattern for its price structure. For the years prior to 1928 all of its sales were made on an f. o. b. mill basis. (Tr. 8386, 8390, 8391.) After the Northwestern Portland Cement Company and the Pacific Coast Cement Company entered the field this respondent found delivered prices had been quoted to some of its customers different from what they would have had to pay had they purchased from this respondent's plants on an f. o. b. mill basis, and in order to meet the competition this respondent began to quote delivered prices. (Tr. 8389, 8438-9.) It has been the uniform practice of Superior Portland Cement, Inc., to bid f. o. b. mill in response to Government invitations whenever requested. There is not a single instance in the record of the refusal of this respondent to do so. In every instance prior to the code this respondent bid f. o. b. mills whenever requested by the Government. See testimony of Mr. Taylor of the Bureau of Reclamation, Tr. 21554 et seq. This was conceded by counsel for the Commission to be the practice of this respondent. (Tr. 21564 to 21571.) Furthermore, it was the continuous practice of Superior Portland to bid f. o. b. mill after the code. Many bids of this respondent were admitted in evidence in re-

sponse to invitations of the Bureau of Reclamation and the Procurement Division. Most of these were clear types of f. o. b. mill bids and only two were so-called "derived f. o. b. mill bids," in which the Government received the benefit of the land grant rates and all of the benefits of an f. o. b. mill bid. (See Tr. 8435; respondent's Ex. 264 A to H inc., received in evidence Tr. 21559; respondent's Ex. 340 A to H inc., received in evidence Tr. 21576; respondent's Ex. 344 A to L inc., received in evidence Tr. 21580; respondent's Ex. 345 A to J inc., received in evidence Tr. 21585; respondent's Ex. 350 A to K inc., received in evidence Tr. 21857; respondent's Ex. 369 A to Z inc., received in evidence Tr. 21796; respondent's Ex. 370 A to K inc., received in evidence Tr. 21798; respondent's Ex. 371 A to K Inc., received in evidence Tr. 21801; respondent's 372 A to W inc., received in evidence Tr. 21801; respondent's Ex. 373 A to M inc., received in evidence Tr. 21803. See also respondent's Ex. 374 A to V inc., 375 A to Z inc., 376 A to ii inc., all identified (Tr. 21791.)

Exception No. 9—F. O. B. Mill Prices. (See Paragraph 135, p. 50 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 135 of the Examiner's report for the same reasons set forth in Exception No. 8.

Exception No. 10—F. O. B. Mill Prices. (See Paragraph 138, p. 51 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 138 of the Examiner's report for the same reasons set forth in Exception No. 8.

Exception No. 11—Agreements, Understandings and Communications. (See Paragraph 166, pp. 63-64 of the Examiner's report.) Exception is taken to the finding contained in the second (unnumbered) paragraph of Paragraph 166 of the Examiner's report upon the ground that there are no facts therein set forth from which the Federal Trade Commission might draw inferences to rebut the direct evidence that this respondent entered into any agreements, understandings or communications in restraint of trade, apply directly or indirectly to this respondent. On the contrary, the overwhelming weight of the evidence affecting this respondent shows a continuous practice of furnishing bids when requested to the Gov-

ernment on an f. o. b. mill basis with non-identical destination costs, which completely rebuts any inference of conspiracy. (See citations listed in Exception No. 5 and Exception No. 8. Furthermore, as to limited membership in the Cement Institute and non-use of basing point method of figuring delivered prices, see Tr. 42895 et seq.) Furthermore, not only is there no evidence from which inferences of an agreement can be drawn but this respondent specifically denied that it entered into any agreement with any other respondent having to do with any of the following matters:

Prices (Tr. 42898)

Freight rate information service on distribution of information with reference to freight rates. (Tr. 42898)

Contract forms (Tr. 42896; Tr. 42897; Tr. 42909; Tr. 42912)

Diversion of shipments in transit (Tr. 42899)

Classification of customers (Tr. 42900)

Discounts (Tr. 42902)

Differential in bag prices (Tr. 42902)

Procedure in reducing or advancing prices of other terms of sale (Tr. 42902)

Boycott of dealers or others handling imported cement (Tr. 42908)

The Compendium (Tr. 42908)

The co-called Code of Ethics (Tr. 42911)

The so-called multiple basing point or other system of prices (Tr. 42917)

B.—Additional Exceptions.

Exception No. 12—Code of Ethics. (See Paragraph 1(a) p. 6 of the Examiner's report.) Exception is taken to the findings in this sub-paragraph that a code of ethics was adopted at the original organization of the Cement Institute in 1929, (Commission's Exhibit 138 S to U inc.) insofar as this finding may be applicable to the respondent, Superior Portland Cement, Inc., on the ground that the evidence shows, as well as the Examiner's report (see paragraph 69, p. 23 thereof), that this respondent did not join the Cement Institute until 1933. (See also Stipulation Tr. 42895.)

Exception No. 13—Compendium. (See Paragraph 1, sub-paragraph (d), p. 7 of the Examiner's report.) Ex-

ception is taken to this sub-paragraph of the Examiner's report with reference to the adoption of the compendium with established terms and marketing methods, on the ground that the evidence conclusively shows that the respondent, Superior Portland Cement, Inc., never agreed to adopt the so-called compendium or to follow any of the practices outlined therein, and it has not caused said compendium to be circularized or distributed to its own sales force or to its dealers or to any other persons or parties." (See Stipulation, Tr. 42908) Counsel for the Commission did not offer or introduce any evidence in conflict with this clear statement of facts contained in the stipulation of this respondent. (In this connection also see Part II, p. 4, sub-paragraph 4 of the statement of contentions of this respondent.)

Exception No. 14—Basing Point System. (See Paragraph 92, p. 32 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reason that the evidence in this proceeding conclusively shows that this respondent does not employ the basing point system and therefore each and all of the statements of philosophy and policy contained therein are incompetent, irrelevant and immaterial (see citations in Exception No. 4), and for the further reason that none of the evidence or citations contained in said paragraph relate to this respondent or any of its policies or practices.

Exception No. 15.—Prevailing Trade Conditions. (See Paragraph 93(b) p. 33 of the Examiner's report.) Exception is taken to the finding contained in this paragraph for the reason that the uncontroverted evidence in this case shows that this respondent never entered into any agreement with any other cement company or the representative of any other cement company or with the Cement Institute or any representative thereof as to the terms and conditions of sale, including discounts, returned sack allowances, freight payment arrangements, contract conditions, etc., except during the period of the N. R. A. insofar as compliance with the code might be so construed. Furthermore, a comparison of the terms and conditions of sale of this respondent with those of other respondents will show the substantial differences which have continuously existed. Furthermore, it has never

been the general practice of this company to use specific sales contract forms for sales to dealers or others in the ordinary course of business. They have been used only to a very limited extent. Its various forms for specific sales contracts and quotations have been changed from time to time at the independent suggestions of this respondent's own officials and attorneys. An examination of forms used from time to time by this respondent will show substantial differences from the contract forms used by other respondents. (See Tr. 42897 et seq. and respondent's Exhibits 3456, 3457, 3458A, 3458B, 3459A, 3459B, 3460A, 3460B, 3461A, 3461B, 3462A, 3462B, 3463A, 3463B. Tr. 42902 to 42906, 42908 to 42913 inc.)

Exception No. 16—Prevailing Trade Conditions—Price Lists. (See Paragraph 93(c) p. 33 of the Examiner's report.) Exception is taken to the finding of the Examiner in this sub-paragraph of his report for the reason that the evidence conclusively shows that this respondent did not use the basing point system and therefore none of the findings or citations contained in this sub-paragraph are material with reference to this respondent, and for the further reason that this respondent's practices were not identical in the matter of broadcasting prices to the trade and checking competitor's prices similarly communicated. In fact the very contrary is true as the uncontroverted evidence in this proceeding shows. While Superior Portland has from time to time received price lists from some other respondents, nevertheless it has never sent out any of its own price lists. A typewritten price list is made up by the company for its use only. (Tr. 8398-8399.)

Exception No. 17—Unspecified Destination. (See Paragraph 93(d), p. 33 of the Examiner's report.) Exception is taken to the finding contained in this sub-paragraph that "Cement could not ordinarily be bought when the destination or point of use was not specified," upon the ground that it affirmatively appears in the record that this respondent repeatedly bid in response to invitations of the Procurement Division when no destination was disclosed, and that this respondent has never refused to bid when the destination was not disclosed. (Tr. 10025, 10221.) See testimony of Admiral Peoples with reference to the so-called "Good Friday Bids" opened on April 15, 1938, in which he testified that companies west of Denver, in-

cluding this respondent, submitted bids in response thereto even though the invitation disclosed no destination. (Tr. 10025-10221. See also the following Exhibits: 1418, 1419, 1422, 1423, 1426, 1427, in which the precise destination was not disclosed but upon which this respondent bid. (Tr. 10272, 10275.) In fact there is no case where Superior Portland refused to bid in response to an invitation failing to disclose destination. (See also Procurement Division bid exhibits cited in Exceptions No. 5 and No. 8. Superior Portland bid on each of the projects, and the invitations on all of them but two of them disclosed no destination.)

Exception No. 18—Prevailing Trade Conditions—Price Changes. (See Paragraph 93(j), p. 33 of the Examiner's report.) Exception is taken to each and all of the findings contained in this sub-paragraph of the Examiner's report for the reason that the evidence in this case shows that this respondent never followed any of the practices with reference to price changes as set forth in this sub-paragraph except during the N. R. A. Code period. (Tr. 42905-42906.)

Exception No. 19—Prevailing Trade Conditions—Freight Absorption. (See Paragraph 93(l), p. 34 of the Examiner's report.) Exception is taken to the findings of the Examiner in this sub-paragraph of his report for the reason that the evidence conclusively shows that this respondent did not use the basing point system and therefore none of the findings or citations contained in this sub-paragraph are material with reference to this respondent, and for the further reason that none of the evidence upon which this finding is made, and none of the citations contained therein, relate to this respondent or any of its policies or practices, and for the further reason that any statement of Mr. Crapo of Huron would not be admissible in evidence as against this respondent.

Exception No. 20—Involuntary Basing Mills. (See Paragraph 104, p. 38 of the Examiner's report.) Exception is taken to the finding of the Examiner contained in this paragraph for the reason that there is no evidence in this proceeding of the establishment of any basing point or base at any competing mill's location and no evidence relating at all to involuntary base mills in any of the territory in which this respondent competes, and there-

fore each and all of the findings contained therein are irrelevant, incompetent and immaterial so far as this respondent is concerned.

Exception No. 21—Trucking. (See Paragraph 120, pp. 44-45 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 120 of the Examiner's report for the reason that the evidence in this case conclusively shows that this respondent has never refused to permit trucking of cement from its plants as the result of any conspiracy, but on the contrary still permits trucking of HYDRAULIC Portland Cement but has always discouraged trucking of standard cement except in carload lots for the reason that the company's two plants were designed for railroad deliveries and to permit trucking caused considerable delay and inconvenience since the trucks would interfere with railroad operations. The evidence further shows that the company found that railroad delivery was the most efficient method so far as Superior Portland operations were concerned, and that it would be very expensive to reconstruct the loading platforms to permit truck deliveries to be made without interfering with railroad operations. (See Tr. 8441, 8448-8449.) Furthermore, Mr. Tongue, officer of this respondent, testified that there had been practically no demand by customers for delivery by trucks, (Tr. 8442) and that rail shipment was cheaper and more convenient to customers of this respondent. (Tr. 8460-61)

Exception No. 22—Trucking. (See Paragraph 121, p. 45 of the Examiner's report.) Exception is taken to each and all of the findings of paragraph 121 of the Examiner's report for the reasons heretofore stated in support of Exception No. 21, and also for the reason that none of the findings therein contained, nor citations in support thereof, directly or indirectly relate to this respondent.

Exception No. 23—Trucking. (See Paragraph 122, pp. 47-48 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 122 of the Examiner's report, except insofar as the finding is made that many manufacturers who had previously permitted trucking discovered that the loading of trucks was an inconvenience and extra expense, and even dangerous, since the uncontroverted testimony relating to this respondent shows the latter to be true, completely nega-

tiving any charge or inference of conspiracy to prevent trucking. (See also citations in Exception No. 21.)

Exception No. 24—Diversions. (See Paragraph 123, p. 46 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 123 of the Examiner's report for the reason that none of the said findings or the citations contained in said paragraph relate to this respondent. On the contrary the evidence in this proceeding clearly shows that this respondent never entered into any agreement or understanding, either oral or in writing, with any other respondent or any other cement company with reference to the diversion of shipments in transit. On the contrary the evidence shows that the only reason for the inclusion in the contract forms of this respondent of a provision against diversion is to protect its regularly established and recognized dealers in their home trading areas. (Tr. 42899.)

Exception No. 25—Diversions. (See Paragraph 124, p. 46 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reasons stated in Exception No. 24, and also for the reason that none of the findings or citations therein contained relate to this respondent.

Exception No. 26—Diversions. (See Paragraph 125, pp. 46-47 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reasons stated in Exception 24, and also for the reason that none of the findings or citations therein contained relate to this respondent, and for the further reason that this respondent did not know of the stipulation stamped on bills of lading as mentioned in this paragraph until this case was instituted, and never used it. (Tr. 42899.)

Exception No. 27—Diversions. (See Paragraph 127, p. 47 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reasons stated in Exception No. 24, and also for the reason that none of the findings or citations therein contained relate to this respondent.

Exception No. 28—Diversions. (See Paragraph 128, p. 47 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reasons stated in Exception No. 24, and also for the reason that none of the findings or citations therein con-

tained relate to this respondent, and for the further reason that it still conclusively appears that this respondent never adopted the compendium of established terms and marketing methods. (See Stipulation Tr. 42908.)

Exception No. 29—Diversions. (See Paragraph 129, pp. 47-48 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reasons stated in Exception 24, and also for the reason that none of the findings or citations therein contained relate to this respondent.

Exception No. 30.—F.O.B. Mill Bids—Land Grant Rates. (See Paragraph 131, p. 48 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph for the reason that the evidence conclusively shows that this respondent bid f.o.b. mill when requested, (see Exception No. 8) and for the further reason that each and all of the findings contained therein are incompetent, irrelevant and immaterial, and for the further reason that the practices therein referred to were not employed for the purpose of identical bidding.

Exception No. 31—Control Clause. (See Paragraph 132, p. 49 of the Examiner's report.) Exception is taken to the findings contained in this paragraph of the Examiner's report for the reason that the evidence conclusively shows that this respondent bid f.o.b. mill whenever requested and that the destination price or cost to the Government quoted by this respondent was not identical with that of other companies with the three exceptions noted (see Exception No. 5), and for the further reason that the evidence conclusively shows that the use of the control clause did not deprive the Government of the benefit of land-grant rates (Tr. 1792-3), and for the further reason that the evidence shows that this respondent has not used the so-called control clause since the termination of the cement code in 1935. (Tr. 8455-57.)

Exception No. 32—Control Clause. (See Paragraph 133, p. 49 of the Examiner's report.) Exception is taken to the finding contained in paragraph 133 of the Examiner's report that Mr. George H. Reiter stated to Prof. Burns that the control clause was devised and employed in order to enable interested members of the industry "to bid on a parity", for the reason that any such statement is inadmissible against and not binding upon this respondent.

Exception No. 33—Control Clause. (See Paragraph 134, p. 49 of the Examiner's report.) Exception is taken to the failure of the Examiner to report in paragraph 134 that this respondent did not file land grant rates with the Institute. (Tr. 42917.)

Exception 34—Dealer Definition and Policy. (See Paragraph 139, p. 51 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 139 of the Examiner's report, for the reason that none of the statements therein contained nor citations in support hereof directly or indirectly relate to this respondent or are binding upon it, and for the further reason that it conclusively appears from the uncontroverted evidence in this case that this respondent has never made any classification of customers or made any definition of policies of made any clear line of demarcation between sales and policies to the customers above outlined except insofar as Article XI of the Cement Code may be so construed. (See Stipulation, Tr. 42900.)

Exception No. 35—Uniform Terms and Discounts. (See Paragraph 148, p. 57 of the Examiner's report.) Exception is taken to the findings contained in paragraph 148 of the Examiner's report upon the ground that the uncontroverted evidence in this case conclusively shows that this respondent did not maintain uniformity or substantial uniformity or material uniformity in its pricing methods. The very contrary is true. (See Stipulation, Tr. 42902, 42903, 42904, 42905, 42908 to 42913, inc., showing differences in discounts and other marketing methods.)

Exception No. 36—Uniform Terms and Discounts. (See Paragraph 149, p. 57 of the Examiner's report.) Exception is also taken to the findings contained in paragraph 149 of the Examiner's report upon the ground that the uncontroverted evidence conclusively shows that this respondent adopted its own forms of sales orders and contracts without any collaboration or agreement with any other party, and that the forms used by this respondent are substantially different from those used by other respondents and that this respondent changes its contract forms from time to time at the independent suggestion of its own officials and attorneys and not at the direction or suggestion or under the influence of any other respondent, person or party. (Tr. 42897 et seq.) and also for the reasons and citations set forth in Exception No. 35.

Exception No. 37—Uniform Terms and Discounts. (See Paragraph 150, pp. 57-58 of the Examiner's report.) Exception is taken to Paragraph 150 of the Examiner's report upon each of the grounds and reasons set forth in the two preceding Exceptions numbered 35 and 36, and for the further reason that an examination of the evidence relating to the terms and discounts of this respondent will show the difference between the terms and discounts set forth in Paragraph 150 of the Examiner's report and those employed by this respondent. (See Tr. 42896, 42897, 42902, 42903, 42904.)

Exception No. 38—Arbitrary Prices. (See Paragraph 158, p. 60 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 158 of the Examiner's report, excepting the one finding relating to competitive conditions and so-called arbitrary prices in the vicinity of Vancouver, Washington, upon the ground that such findings and citations in support thereof do not relate directly or indirectly to this respondent.

Exception No. 39—Maintaining the Institute. (See Paragraph 159, pp. 60-61 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 159 of the Examiner's report, upon the ground that the uncontroverted evidence conclusively shows that the relationship of this respondent to the respondent Cement Institute was very limited, and it did not collaborate with the respondent Cement Institute or any other associations in any activities which could even remotely tend toward uniformity of price and method or to any conspiracy or agreement in restraint of trade except during the period of the N.R.A. insofar as compliance with the code might be so construed. This respondent never contracted for nor received nor used freight rate books, contract checking services, credit reporting services or any other special services which may have been furnished by the Cement Institute. The services received by this respondent from the Cement Institute were those of any normal trade association. (See Tr. 42895 et seq.)

Exception No. 40—Pacific Coast Cement Institute. (See Paragraph 174, pp. 66-67 of the Examiner's report.) Exception is taken to the findings contained in Paragraph 174 of the Examiner's report upon the ground that the uncontroverted evidence in this case conclusively shows that this respondent received no services or information

from the Pacific Coast Cement Institute other than that of a normal and legal trade association nature and that this respondent did not participate in any activities of the Pacific Coast Cement Institute, if any there were, which even remotely affected or could affect the pricing methods or policies of this respondent or any other respondent (see Tr. 9261 to 9264). And for the further reason that this respondent did not receive from the Pacific Coast Cement Institute a quarterly report and current information, contract reports from its members, contract checking, land grant rates, but on the contrary only received the Bureau of Mines tabulations. (Tr. 8425-8426.)

Exception No. 41—Price Lists. (See Paragraph 182, p. 69 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 182 of the Examiner's report upon the ground that the uncontroverted evidence conclusively shows that this respondent did not exchange any price list with any other respondent or other company and never distributed any prices. (See Tr. 8397, 8424, 8435, 8436, 8474.)

Exception No. 42—Opposing New Mills. (See Paragraph 188, pp. 71-72 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 188 of the Examiner's report on the ground that it is incompetent, irrelevant and immaterial, not within the issues of the case, and even if true would not give rise to any inferences or furnish any evidence of any violation of the Federal Anti-trust Laws.

Exception No. 43—Opposing New Mills. (See Paragraph 191, p. 72 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 191 of the Examiner's report on the ground that it is incompetent, irrelevant and immaterial, not within the issues of the case, and even if true would not give rise to any inference or furnish any evidence of any violation of the Federal Anti-trust Laws.

Exception No. 44—Opposing New Mills. (See Paragraph 192, p. 73 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 192 of the Examiner's report on the ground that it is incompetent, irrelevant and immaterial, not within the issues of the case, and even if true would not give rise to any inference or furnish any evidence of any violation of the Federal Anti-trust Laws.

Exception No. 45—Opposing New Mills. (See Paragraph 194, p. 73 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 194 of the Examiner's report on the grounds that it is incompetent, irrelevant and immaterial, not within the issues of the case, and even if true would not give rise to any inference or furnish any evidence of any violation of the Federal Anti-trust Laws.

Exception No. 46—Burns and Clark. (See Paragraph 199, p. 74 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 199 of the Examiner's report upon the ground that the same are incompetent, irrelevant and immaterial and do not tend to prove any agreements or conspiracy in restraint of trade or give rise to any inference from which any agreement or understanding could be presumed.

Exception No. 47—Price Filing. (See Paragraph 200, p. 75 of the Examiner's report.) Exception is taken to the findings contained in Paragraph 200 of the Examiner's report upon the ground that each and all of the actions of this respondent and other respondents during the period of the N. R. A. Code were taken pursuant to the apparent authority and compulsion of the National Industrial Recovery Act, the code of fair competition for the cement industry promulgated under the authority of the Federal Government and under Governmental rulings pursuant thereto, and do not furnish any evidence of conspiracy in restraint of trade.

Exception No. 48—Price Filing. (See Paragraph 201, p. 75 of the Examiner's report.) Exception is hereby taken to each and all of the findings contained in Paragraph 201 of the Examiner's report upon the ground that the evidence conclusively shows that the continuation of filings with the Trade Practice Committee during the so-called twilight period following the termination of the code was at the request of the President of the United States and other administration leaders seeking the voluntary cooperation of the industry in the transition period. (Respondent's Ex. 31-A and B; 739; Com. Ex. 623-A to C; Tr. 2823-24; 14065-66; 17054-65; 23938-40; 27004; 28703; 29211; 34775; 34979-80; 38659; 41621; 42320-21; 42446-47; 46950.)

Exception No. 49—Contract Checking. (See Paragraph 202, pp. 75-76 of the Examiner's report.) Exception is

taken to the finding contained in this paragraph of the Examiner's report for the reason that none of the facts therein stated and none of the citations directly or indirectly relate to this respondent, and for the reason that the uncontroverted evidence in this connection conclusively shows that this respondent did not subscribe to the contract checking service of the Institute. (See Tr. 42895.)

Exception No. 50—Production and Shipment Statistics. (See Paragraph 212, p. 80 of the Examiner's report.) Exception is taken to each and all of the findings contained in paragraph 212 of the Examiner's report upon the ground that the same are incompetent, irrelevant and immaterial, and are not evidence in support of any of the allegations of the complaint herein, and for the further reason that the evidence in this case shows that this respondent was not even in existence at the time of the matter referred to in this paragraph. (Tr. 42893.)

Exception No. 51—Production and Shipment Statistics. (See Paragraph 213, p. 80 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 213 of the examiner's report upon the ground that the same are incompetent, irrelevant and immaterial and are not evidence in support of any of the allegations of the complaint herein, and for the further reason that this respondent was not a member of said association.

Exception No. 52—Production and Shipment Statistics. (See Paragraph 215, p. 81 of the Examiner's report.) Exception is taken to the finding contained in this paragraph of the Examiner's report for the reason that none of the facts therein stated and none of the citations directly or indirectly relate to this respondent, and for the further reason that the evidence does not show that this respondent subscribed to said Mallory Service.

Exception No. 53—Production and Shipment Statistics. (See Paragraph 218, p. 82 of the Examiner's report.) Exception is taken to each and all of the findings contained in Paragraph 218 of the Examiner's report upon the ground that the uncontroverted evidence conclusively shows that the figures as to production, shipments, capacities, etc. received from the Institute by the respondents on the Pacific Coast do not go any further than the Bureau of Mines figures, and for the reason that none of the statements or citations in support thereof contained in said paragraph directly or indirectly relate to this respondent.

Exception No. 54—Expert Economic Testimony. (See Paragraph 226, p. 85 of the Examiner's report.) Exception is taken to each and all of the findings based upon the Commission's expert testimony as contained in Paragraph 226 of the Examiner's report upon the ground that the assumption of fact contained in each of the hypothetical questions addressed to the Commission's economic expert witnesses were contrary to the uncontroverted evidence in this case insofar as it relates to the marketing practices of this respondent and the territory in which it operates. Note the assumptions contained in the "long hypothetical question" addressed to Dr. Fetter (Tr. 17639-40). For hypothetical question asked of Dr. Duddy see Tr. 15269-70. For hypothetical question asked of Dr. Hubbard see Tr. 15420-21-22. For hypothetical question asked of Dr. Viner see Tr. 15621-22. Note also the admission of Dr. Viner on cross-examination that if all of the principal assumptions contained in the hypothetical question addressed to him were not true, then it would substantially change the meaning of his question and answer. (Tr. 15896.) At least two of the assumed essential features of the basing point system as outlined in these questions do not apply insofar as this respondent is concerned, to-wit, the assumption of the coexistence of basing-point and non-basing point mills and the establishment of basing points by manufacturers at some point other than its shipping point. Furthermore, as this respondent has repeatedly pointed out there is no evidence in this case establishing the use of basing points at all by Superior Portland Cement, Inc.

Exception No. 55—Competition. (See Paragraph 228, p. 87 of the Examiner's report.) Exception is hereby taken to the finding contained in paragraph 228 of the Examiner's report that competitive rivalry did not ordinarily manifest itself in the form of price differentials insofar as this respondent is concerned, upon the ground that the uncontroverted evidence shows that on the bulk of its Government business there was the keenest price competition and also severe price competition on commercial business, resulting in secret price cuts, and also upon the ground that as hereinabove set forth the terms and discounts of this respondent differed materially from the terms and discounts of the other respondents.

Exception No. 56—Contract Checking. Exception is

taken to the failure of the Examiner to find that this respondent never gave any information to the Cement Institute or any other organization on cement contracts awarded and that no reports were made by the Cement Institute or any other organization of person on cement contracts to this respondent or any other respondent in District No. 12. (Tr. 42896.)

Exception No. 57—Classification of Customers. Exception is taken to the failure of the Examiner to report that this respondent never made any classification of customers nor has it been a party to any agreement or understanding with reference thereto except as Article XI of the Cement Code may have been so construed. (Tr. 42900.)

Exception No. 58—Boycott. Exception is also taken to the failure of the Examiner to report that this respondent has never boycotted or threatened to boycott dealers, customers or others who trade in imported cement; has never resorted to espionage or similar methods directed against those who handle imported cement and has never been a party to any concerted and uniform deviation from prices which would prevail at centers of importation of cement for the purpose of boycotting the same. (Tr. 42908.)

Exception No. 59—Agreements, Understandings and Communications. (See Paragraph 166, p. 63 of the Examiner's report.) Exception is taken to each and all of the findings contained in this paragraph of the Examiner's report upon the ground that none of the findings therein contained apply either directly or indirectly to this respondent, and the uncontroverted evidence is contrary to all of said findings insofar as this respondent is concerned. (See statements and citations in Exception No. 11.)

Exception No. 60—Pacific Portland Cement Association. (See Paragraph 176, p. 67 of the Examiner's report.) Exception is taken to the findings contained in this paragraph of the Examiner's report upon the ground that they are incompetent, irrelevant and immaterial.

Exception No. 61. A separate exception is also taken to each and all of the findings contained in each and all of the following paragraphs of the Examiner's report, for the reason and upon the ground that none of the evidence or the citations contained therein relate to this respondent or any of its policies or practices, and each and all of said findings are incompetent, irrelevant and immaterial as to this respondent.

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90 31
91 31-32
93-e 33
93-f 33
93-g 33
95 34
96 35
97 35
98 35
99 35
100 35
101 35 et seq
102 38
103 38
105 38
106 38-39
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108 39
109 40
110 40
111 40
112 40-41
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126 47
137 50-51
140 52
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142 54
143 55
144 55
145 55-56
146 56
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155 59
156 59-60

Paragraph 157 Page 60
160 61
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164 62
167 64
168 65
169 65
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171 65-66
172 66
173 66
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Paragraph 219 Page 82

This respondent also adopts each and all of the exceptions taken by or on behalf of other respondents to the Examiner's report for the same reasons and upon the same grounds as if the same were incorporated herein, together with the citations in support thereof.

Respectfully submitted,

Superior Portland Cement, Inc.

By Little & Leader,

Counsel.

(Caption—3117)

EXCEPTIONS OF RESPONDENT CALIFORNIA PORTLAND CEMENT COMPANY TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Received Nov. 13, 1941.)

Respondent California Portland Cement Company, a corporation, excepts to the Trial Examiner's Report upon the Evidence in particulars as are herein set forth.

The exceptions to findings, recitals and statements are made generally on the ground that the evidence is not sufficient to sustain the finding, statement or recital, and exceptions to failures to find are made generally on the ground that an issue is raised on which a finding is required and the evidence is such as to require a finding on the issue in the manner stated herein. These general grounds of exception will not be repeated in the particular exceptions. The number of each exception herein follows the number of the paragraph of the Examiner's Report to which the exception is directed. Where no exception is taken to a paragraph of the Report there is no number in these exceptions corresponding to the paragraph number of the Report. The letters of subparagraphs of the exceptions have no relationship to the lettering of subparagraphs or portions of the Examiner's Report.

1. (a) Respondent excepts to paragraph 1 of the Report and any finding therein (if any is intended) that Respondent in any way agreed to or did at any time fix or determine any of its operations, methods or policies in accordance with any "Code of Ethics" of The Cement Institute or any "Compendium of Established Terms and Marketing Methods" or any articles or amended articles of incorporation of The Cement Institute, or that it agreed to

or did base any of its operations, methods or policies on the Code of Fair Competition for the cement industry or any amended code except during the period when such Code was enforced by the Government under the provisions of the National Recovery Act. (Tr. 42446-48, 42485-90; there is no evidence otherwise.)

(b) Respondent refers to and adopts the exceptions to said paragraph 1 filed on behalf of Respondent The Cement Institute.

3. (a) Respondent excepts to the failure to expressly find that Respondent at no time furnished to The Cement Institute any information concerning credits, concerning specific job contracts or other contracts for the future deliveries of Portland cement, concerning production or stocks on hand of clinker or Portland cement, concerning cloth sack returns, or any information concerning shipments of Portland cement except that furnished for the purpose of fixing dues, and that Respondent at no time sent land grant freight information to The Cement Institute or used, or made any bid on the basis of, any land grant freight rate information received from The Cement Institute (Tr. 42447, 42472, 42494; there is no evidence otherwise), and that the company at no time made reports to The Cement Institute or to Mr. Mallory or his organization for the Mallory statistics, or made any use of the Mallory statistics.

(b) Respondent refers to and adopts the exceptions to said paragraph 3 filed on behalf of Respondent The Cement Institute.

4. (a) Respondent excepts to the statement or implication in paragraph 4 of the Report that the evidence shows any activity of the Institute (outside of its statutory activities as Code Authority) in connection with any activity of this Respondent. (Tr. 42448, 42490; there is no evidence of any such activity.)

14. (a) Respondent excepts to the finding that it was involved in identical bidding with competitors and to any implication that the bids referred to in the Report were in any way similar to the idenfical bidding alleged in the complaint and to the failure to find with respect to the bids referred to in the Report that the June 9, 1931 bid to the Navy Department was in response to an invitation for bids f.o.b. destination only, was a destination price bid, was made before the Respondent's membership in The Cement Institute, that the June 26, 1934 bid was in response to a

Navy Department invitation for bids f.o.b. destination, was a destination price bid, was made during the Code period, that the April 9, 1937 bid was a f.o.b. mill bid, was based on a prior bid history. (Com. Ex. 378, 381, Tr. 42811-22.)

(b) Respondent excepts to the finding that it was involved in a joint bid with five other respondents on March 26, 1934 or at any other time, and to any implication that the bid is evidence or proof of any allegation of the complaint. There were four joint bidders, including this Respondent. There were two other competing bids. Bids were f.o.b. mills and were not identical. (Com. Ex. 134.)

(c) Respondent excepts to the failure to find that except in relatively few instances and during the Code period Respondent followed the practice of bidding on federal government invitations on an f.o.b. mill basis, that in most of its bids the company based its bid price on its generally offered price for the destination named in the invitation, deducting commercial freight and sometimes with and sometimes without an additional deduction of cents without fractions or decimals, that since transportation from the company's mill and the mills or shipping points of the company's competitors to the government destinations was in part over land grant railroads, the freight rate from the company's mill to government destinations was in most cases different from the government's freight rate from competitor's mills and shipping points, that as a result the government's destination cost on the company's bids in practically every instance was different from the destination cost on bids of competitors, that Respondent has not had or followed a policy or practice of fixing its prices on government bids by attempting to determine the exact land grant rate of the most favorably located competitor and deriving a bid which would tie competing bids in destination costs. (Tr. 42477-83.)

(d) Respondent excepts to the recital that its price lists of March 19, 1935 (Ex. 1305) or June 2, 1935 (Ex. 1306) during the Code period were indicative of uniform policies or any policy of Respondent or that the price list of December 2, 1935 (Ex. 1308) is evidence "as to uniform policies" or that there is evidence of any collective action by Respondent. (Tr. 42462, 42463, 42487-90, 9318-37, 42461, 42786; there is no evidence to support the finding or implication.)

82. (a) Respondent excepts to the finding or findings

or implications that this Respondent is or has been identified with any activity of The Cement Institute or any group activity alleged in the complaint, that any references to this Respondent in the Report contained facts which go to identify this Respondent with any activities of the Institute or any group activities alleged in the complaint, or that there is any evidence which is sufficient to sustain a finding that this Respondent was a party to any combination to hinder, lessen, restrict or restrain price competition or to employ any of the methods or practices alleged in the complaint, or that it did employ any of such methods or practices or that any activity of this Respondent did, or had any tendency to, produce the conditions or results alleged in the complaint.

(b) Respondent excepts to the findings or statements in the Report as to this Respondent of acts, methods or practices of other respondents to which this Respondent is not found expressly to have been a party, on the ground that the Report does not find that this Respondent was a party to any conspiracy with such other respondents, and acts of other respondents in which this Respondent did not expressly patricipate are not competent or material to prove this Respondent's participation in a conspiracy, and until a conspiracy by this Respondent is found are not competent or material to prove a carrying out of the alleged conspiracy.

83. Respondent excepts to the finding that it ships cement "in a constant stream of interstate commerce", and to the failure to find that the interstate commerce of Respondent has constituted only approximately 4% of its total commerce; that due to distance and freight rates from out of state mills to market points in California there is practically no cement shipped from any other state into Southern California where Respondent has its principal market, and that there is practically no shipment of cement to Southern California from foreign countries. (Tr. 42448, 42455, 42458, 42459)

84-87. (a) Respondent refers to and adopts the exceptions filed herein on behalf of respondent The Cement Institute.

(b) Respondent excepts to the failure to find that Respondent has one cement mill, that Respondent's mill is located on property which has been owned by the company since 1892, that its limestone is quarried from deposits on

the property on which its mill is located, that its mill and its source of its limestone have been located on the same property which has been owned by it since 1892, that the stock of the corporation is closely held, the great bulk of the stock being held by five stockholders, that substantially all of the stockholders are residents of Southern California, that no officer of director of the company is an officer or director of any other of the respondent companies except that F. E. Duque has been a trustee of The Cement Institute. (Tr. 42455, 42445.)

88-92, 158. (a) Respondent excepts to the finding or implication that it has employed the "basing point system" of fixing prices in any of its market territory. (Com. Ex. 1304-1312, Tr. 42460-65, 42448, 42514.)

(b) Respondent excepts to the finding that the "flat" or "price list" price system appeared or was used in Arizona only in 1936 and prior thereto. (Com. Ex. 1304-1312, Tr. 42463.)

(c) Respondent excepts to the finding that the "flat" or "price list" price system instead of the "basing point system" was used because "the regular price basing methods could not be employed." (See reference above.)

(d) Respondent excepts to the failure to expressly find that the methods by which prices of cement have been fixed or quoted in Southern California or in any California markets where Respondent has done business, or the methods by which prices of cement have been fixed or quoted in Arizona or in the portion of Nevada in which Respondent has done business, or any of such methods, are not the same as or similar to the price methods or systems used in the eastern part of the country or the system described in the complaint as a "multiple basing point price system." (Tr. 42448.)

(e) Respondent excepts to the finding or implication that it has accepted or agreed to any policy as reported in subsections (a) to (r) of paragraph 92 of the Report. Acting individually and independently and on the basis of experience, Respondent might agree that some of the conclusions are sound from a business standpoint. There is no evidence to sustain any finding of agreement with respect to any of such conclusions.

(f) Respondent refers to and adopts the exceptions to said paragraphs of the Report filed on behalf of The Cement Institute in so far as they relate to any acts, practices or policies of this Respondent.

93. (a) Respondent excepts to the finding or implication that the conditions listed existed generally in the trade area in which the Respondent has marketed its cement, whereas as to most of the items there is no evidence of conditions existing in the said trade area, and as to many of the items the evidence affirmatively establishes that the listed condition did not apply in said area, at least for many years prior to the commencement of this proceeding. (Tr. 9318-9337, 42445-48, 42454-504.)

(b) Respondent excepts to the finding or implication that the conditions listed or any of them existed or developed through any agreement or common action to which this Respondent was a party. There is no evidence to sustain such a finding or implication, and as to most of the items the evidence affirmatively shows the contrary. (Same references.)

(c) Respondent excepts to the citation of and reliance on evidence of acts of respondents other than this Respondent to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, condition, agreement or common action against this Respondent. (Same references.)

(d) Respondent excepts to any finding or implication that it used the basing point method or applied the "foregoing principles" referred to in said paragraph 93. (Same references.)

94. (a) Respondent excepts to the finding or implication that it had or followed any practice or policy to submit bids on government invitations which were identical with bids of competitors. Reference is made to subparagraphs (b) and (c) of the exceptions to paragraph 14 of the Report.

(b) Respondent excepts to the finding or implication that from June 29, 1934 to June 15, 1935 it did not bid on government invitations below prices filed with the Code Authority. (There is no evidence.)

(c) Respondent excepts to the characterization of the President's 15% order and to the characterization of the objections thereto of certain respondents as stated in the Report, on the ground that there is no evidence to support any such characterization.

(d) Respondent excepts to the finding or implication that it ever withdrew or asked leave to withdraw a bid because of mistake or miscalculation or for other reasons.

or that it bid high on an invitation in order or with knowledge that it would not get the business, or that it bid on any invitation where there was a "group figure." (Tr. 42470.)

(e) Respondent excepts to the citation of or reliance on evidence of acts of respondents other than this Respondent to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, condition, agreement or common action against this Respondent.

(f). Respondent excepts to any finding or implication that the bids referred to in paragraphs 95-101 are exemplary of any bids made by this Respondent or are typical or similar to any bidding practices of this Respondent. (Reference is made to subparagraphs (b) and (c) of the exceptions to paragraph 14 of the Report.)

95-103. Respondent excepts to the citation of and reliance on any evidence of acts of respondents other than this Respondent to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, condition, agreement or common action against this Respondent.

104-113. (a) Respondent excepts to any finding or implication that Respondent used the basing point method, that it ever "established a base" at a competing mill's location, that it ever took any penalizing measures against any competitor because of any price change or cut or otherwise, that it joined or agreed with any other respondent corporation or person to impose a base at a competing mill or otherwise to penalize action in making a price change or cut, or that it had anything to do with "the ethics of the basing point system". (See references in exceptions to paragraphs 88-92 of the Report.) (There is no evidence to support any such finding against Respondent.)

(b) Respondent excepts to any finding or implication that the alleged "cases of basing points being imposed on mills" referred to in paragraph 104 of the Report are exemplary or typical of or similar to any act or practice of this Respondent.

106-112. Respondent excepts to the report or citation of and reliance on evidence of acts of respondents other than this Respondent to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

114-119. (a) Respondent excepts to the findings or implications in paragraphs 114-119 of the Report that it received or used the Institute freight rate books or the freight rate books of any organization, corporation or person, other than the official rate tariffs of the carriers and the official rate tariffs of agents of carrier groups for two or more line hauls, in determining or quoting its prices, that it had anything whatever to do with the preparation, or distribution of the Institute freight rate books or with the use thereof by any other respondent, that it did any of the acts or made any of the statements attributed to "respondents" in said paragraphs of the Report. (Tr. 42460-64, 42471. There is no evidence to support the finding.)

(b) Respondent excepts to the failure to expressly find that Respondent did not receive or use or have anything to do with the preparation of the Institute freight rate books and did not use the same in determining or quoting its prices. (Same references.)

(c) Respondent refers to and adopts the exceptions to paragraph 114 filed on behalf of The Cement Institute.

(d) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent, reported in paragraphs 114-119 of the Report, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

121. (a) Respondent excepts to the finding or implication that Respondent has added a premium to its mill price for deliveries to customers' trucks at the mill at any time after 1930. (Tr. 42475, 42637-43.)

(b) Respondent excepts to the finding or implication that Respondent has had any policy or practice not to sell on a true f.o.b. mill price for delivery to trucks. (Same references.)

(c) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent, set forth in paragraph 121, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement of common action against this Respondent.

122. (a) Respondent excepts to the finding or implication that it has prohibited or discouraged trucking or

the sale of cement for truck delivery. (Tr. 42475-77, 42637.)

(b) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent, as referred to in paragraph 122, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent. There is no evidence to tie in this Respondent with any such activities.

123-129. (a) Respondent excepts to the finding or implication that it has adopted or enforced any policy or practice against diversions of shipments in transit. (Tr. 42477.)

(b) Respondent excepts to the failure to expressly find that Respondent has not met with any problem in the diversion of cement in transit and has never adopted the practice of stamping or printing a provision against diversion on its bills of lading. (Tr. 42477.)

(c) Respondent excepts to the finding or implication that it "employed" or observed the Compendium of Established Terms and Marketing Methods or used the form of specific sales contract recommended therein or used the provisions in said contract form or any similar provisions against or penalizing diversions in transit. (Tr. 42477, 42487-90. Resp. Ex. 3444.)

(d) Respondent excepts to the finding or implication that it has any fixed or definite policy or practice with respect to prepayment of freight or requiring the buyer to pay freight. (Same references.)

(e) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent, as reported in said paragraphs, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

130-138. (a) Respondent excepts to the finding or implication that it did not bid on Government invitations on an f.o.b. basis and f.o.b. mill basis when the Government requested such bids and excepts to the failure to find that Respondent's policy and practice in this respect was as is set forth in the exceptions herein in subparagraph (c) of the exceptions to paragraph 14 of the Report. (Tr. 42477-83, 42470.)

(b) Respondent excepts to the finding or implication that it filed prices with the Institute's Trade Practice Committee after the Code period or after June 2, 1935. (Tr. 42494.)

(c) Respondent excepts to the finding that f.o.b. mill prices had any effect under the freight rates prevailing from the Southern California mills to their interstate market points to reveal mill net price inequalities. (Tr. 42464.)

(d) Respondent excepts to the finding that a revelation of mill net price inequalities is advantageous or disadvantageous to either seller or buyer.

(e) Respondent excepts to the finding or implication that it reported land grant rate information to the Institute or to any other person or organization, or made use of land grant rate information received from the Institute. (Tr. 42472.)

(f) Respondent excepts to the finding or implication that it failed or neglected or refused to bid direct on P.W.A. or W.P.A. jobs, or that it refused to permit orders sold by dealers to be shipped on Government bill of lading, or that it agreed or cooperated with dealers to carry out any policy of refusing to sell direct to P.W.A. or W.P.A. jobs. (Tr. 42684, 42786, 42792.)

(g) Respondent excepts to the finding or implication that an f.o.b. mill price derived from a destination price less freight from mill to destination is not an f.o.b. mill price.

(h) Respondent excepts to the finding or implication that it refused to bid on Government invitations at f.o.b. mill prices which were not derived from destination price less freight. (Tr. 42645-46, 42799-802.)

(i) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent purportedly reported in paragraphs 130-138 of the Report to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

139-146. (a) Respondent excepts to the finding or implication that it joined or agreed with any other respondent in formulating or carrying out any definition or policy of what constitutes a "dealer", or that it has had or has enforced (except possibly during the Code

period) any fixed or definite definition, rule or policy as to what constitutes a "dealer". (Tr. 42485, 42674.)

(b) Respondent excepts to the finding or implication that its policies or practices in selling cement direct to consumers have changed or developed by reason of or under influence of any cooperative joint or common action with any other respondent or with any organization of dealers, or have changed in any material respect except as to W.P.A. sales for more than fifteen years. (Tr. 42485-87.)

(c) Respondent excepts to the finding or implication that it has participated in any group discussions with competitors or with dealers' associations on the subjects of dealer definition or direct selling, or that it has made or participated in any "settlement of policy", or in any "observations or enforcement of marketing methods" or in any "activities" on the subjects. (See references above. There is no evidence connecting Respondent with any group discussions.)

(d) Respondent excepts to the report or citation of or reliance on purported evidence of acts of respondents other than this Respondent purportedly reported in paragraphs 139-146 to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

147. (a) Respondent excepts to the finding or implication that it has had or has enforced any policy to discourage or prevent a dealer from selling outside his locality and in territory served by another dealer. (There is no evidence.)

(b) Respondent excepts to the finding or implication that the practices of a dealer selling outside his "territory" has had any effect or tendency to upset any prevailing or going price in any locality within Respondent's market area. (There is no evidence.)

(c) Respondent excepts to the finding or implication that it has had any policy with respect to place of delivery to dealer or place of dealer's sales which has existed for any reason other than a long continued custom in the building material business and a desire to "get along" with dealers. (Tr. 42484-85.)

(d) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this

Respondent referred to in the Report to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

448-450. (a) Respondent excepts to the finding or implication that there has been any uniformity in the pricing methods used in Respondent's market area as compared with pricing methods elsewhere. (See exceptions to paragraphs 88-92.)

(b) Respondent excepts to the finding or implication that Respondent has agreed or acted with or taken any action with respondents generally, or with any other respondent or respondents, to maintain uniformity of terms or discounts. (Tr. 42487-90.)

(c) Respondent excepts to the finding or implication that the terms of sale or discounts prevailing in Respondent's market area are uniform, or uniform in all or most material respects, with terms and discounts prevailing in other parts of the country. (Resp. Ex. 1304-1312. Tr. 42487-90.)

(d) Respondent excepts to the finding or implication that the terms of sale maintained by Respondent are uniform with the terms of sale maintained by other respondents in the market area of this Respondent, or that Respondent has terms of sale which are invariably applied. (Tr. 42487-90.)

(e) Respondent excepts to the finding or implication that the discounts and terms prevailing in its business are not the result of natural tendency and custom. (Tr. 42487-90.)

(f) Respondent excepts to the finding or implication that it adopted or used the form of specific sales order or the form of Future Specific Sales Contract except during the Code period, or that it has followed or complied with the provisions of the "Compendium of Established Terms and Marketing Methods". (Tr. 42487-90.)

(g) Respondent excepts to the finding or implication that the terms and discounts listed in paragraph 150 of the Report have been maintained or have prevailed in Respondent's marketing area or have been used or applied by Respondent. (Tr. 42487-90.)

(h) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than

this Respondent, referred to in paragraphs 148-150, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

151-158. (a) Respondent excepts to the finding or implication that there has been any competition with foreign cement or that foreign cement in any substantial quantity has been received in Respondent's market area for many years. (Tr. 42459.)

(b) Respondent excepts to the finding or implication that it was a party to or had anything whatever to do with any of the purported acts or practices reported in paragraphs 151-158 of the Report. (There is no evidence.)

(c) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent, as set forth in said paragraphs 151-158, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action by this Respondent.

159-160. (a) Respondent excepts to the finding that The Cement Institute was an agency of or represented this Respondent either in common with other respondents or otherwise, that the Institute carried on any activities which related to or affected Respondent's market area in particular, that any activity of the Institute had any effect upon the pricing or marketing policies of this Respondent or tended to induce uniformity of price or method. (Reference is made to the Tr. and Ex. citations heretofore referred to.)

(b) Respondent excepts to the failure to find expressly that The Cement Institute or any of its committees did not at any time have anything to do with the formulation or carrying out of any of the business or sales policies or practices of this Respondent, that this Respondent or its officers or representatives have never known, considered or believed that it has been a function of The Cement Institute to interpret the policies of the cement companies or to formulate policies for the industry, either through its principal office or its officers or trustees, or through any regional offices, freight bureaus, or committees, or that the Institute has existed or acted for the promotion

of a combination among cement companies to hinder, lessen, restrict or restrain competition in price among cement manufacturers, or to establish or maintain a multiple basing point pricing system or any system or method of pricing, that in joining the Institute or in continuing its membership Respondent did not know or believe that the Institute was created or existed for any purposes not fully disclosed in its articles of association as they existed in 1933 or as they were amended December 11, 1935, that Respondent has never furnished the Institute any information concerning credits, information concerning specific job contracts or other contracts for the future delivery of cement, information concerning production or stocks on hand of clinker or Portland cement, information concerning cloth sack returns, or information concerning shipments of Portland cement, except that furnished for the purpose of fixing dues, that the company became a member of The Cement Institute in June, 1933, while the Cement Code was being formulated under the provisions of the National Industrial Recovery Act for the reason that it deemed it necessary to join the Institute in order to participate in the formulation of the Code and in the passing on any proposals for the amendment thereof, and that in so doing Respondent sought and acted upon the advice of its attorneys that such action was in conformity with law; That after the Code became inoperative in June, 1935, Respondent was solicited by the officers of the Institute to continue its membership and Respondent continued such membership because said officers represented to it and it was convinced that the Institute would constitute a contact between the manufacurers of cement and the legislative and administrative bodies of the United States Government in matters affecting cement companies in general, such as special taxes, tariffs, reciprocal trade agreements, improvement of Government statistical services, etc. (Tr. 42446-48.)

(c) Respondent excepts to the report or citation of or reliance on purported evidence of acts of respondents other than this Respondent, as referred to in said paragraphs 159-160, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

160-162. (a) Respondent excepts to the finding or im-

plication that it employed the "basing point system", that it was ever invited to quote the State of Illinois, that it failed to quote f.o.b. prices to the United States, or that it made bids identical with bids of competitors, or that it had any interest in excusing or combating any adverse public opinion regarding any practices of such nature, or that any "propaganda" or advertisements published by The Cement Institute were published for any purpose to carry out any policy or agreement to which this Respondent was a party or in any way concerned. (See references and exceptions to paragraphs 14, 88-90, 94, 130-138 of Report.)

(b) Respondent refers to and adopts the exceptions to paragraphs 161-162 filed on behalf of Respondent The Cement Institute.

163. (a) Respondent excepts to the finding or implication that Colton-Crestmore, or either Colton or Crestmore, constituted a basing point within the meaning of the term as it is used in the complaint and in paragraphs 88-92 of the report. (Tr. 42460-64.)

(b) Respondent excepts to any implication that it had anything to do with the policy or practice of Southwestern Portland Cement Company in fixing its Arizona prices or the mill net resulting from its destination prices, or that the El Paso mill net resulting from destination prices in Arizona was a "base price" within the meaning of the term as it is used in the complaint and in paragraphs 88-90 of the Report. (Tr. 42463-64, 42456-42465, 42569 et seq.)

(c) Respondent excepts to the report or citation of or reliance on purported evidence of acts of respondents other than this Respondent, referred to in paragraph 163, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

164. Exception is taken to paragraph 164 of the Report on the ground that there is no evidence in the record connecting this Respondent with any of the acts or conduct reported in said paragraph.

165. Respondent excepts to the finding that since 1932 price changes have been infrequent in its market territory or that the changes have been within narrow limits, that selling below announced price was only occasional or that

deviations were not in favor of the Government. (Tr. 42491, 42478-83, 42484, 42598-601, 42778, 42828.)

166-168. (a) Respondent excepts to the finding or implication that it has not denied, or that there is any evidence to support a finding, that it has participated in identical bidding, that it has used the "basing point method" of figuring delivered prices, that it has adhered to arbitrary prices, that it has conformed to dealer policies as alleged in the complaint or found in the Report, that it has conformed to any policy respecting trucking or diversions as alleged in the complaint or found in the Report, that it has used the Institute freight rate books or that it has attended any meetings other than certain meetings of the Institute. (Reference is made to the citations on each of the particular subjects heretofore made.)

(b) Respondent excepts to the statement that it has engaged in practices or created or contributed to conditions, or that conditions or practices with respect to its business or its trade area have been shown to prevail, from which any inference of collusion, agreement, concerted action or mutual understanding may be drawn. (Reference is made to the citations heretofore made.)

(c) Exception is taken to paragraphs 167 and 168 on the ground that there is no evidence in the record connecting this Respondent with any of the organizations, or with any of the meetings, activities, acts or conduct referred to in said paragraphs, and on the ground that it expressly appears in Paragraph 167 that Respondent was not a member of the association therein referred to. (See also Tr. 42493.)

(d) Respondent excepts to the report or citation of or reliance on purported evidence of acts respondents other than this Respondent as set forth in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

169-170. (a) Exception is taken to paragraphs 169-170 on the grounds that there is no evidence in the record connecting this Respondent with any of the organizations, agreements, activities, acts or conduct reported in said paragraphs.

(b) Respondent excepts to the failure to expressly find that Respondent was never a member of the association re-

ferred to in said paragraphs, or a licensee thereunder. (Tr. 42493.).

171-173, 175-177. (a) Exception is taken to paragraphs 171-173, 175-177 on the ground that there is no evidence in the record connecting this Respondent with any of the acts or conduct reported in said paragraphs, and on the ground that it expressly appears from the record that Respondent was never a member of any of the organizations or associations referred to in said paragraphs. (Tr. 42493. See also paragraphs 176 and 177 of Report.)

(b) Respondent excepts to the report or citation of and reliance on purported evidence of acts of respondents other than this Respondent, referred to in said paragraphs of the Report, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

173. (a) Respondent excepts to the finding or implication in paragraph 173 that it participated in any discussions with other respondents of dealer policies or plans for sharing available business, or that it was a member of any organization which adopted or did anything to carry out any such plan. (Tr. 42493-94.) (b) Respondent adopts exceptions to paragraph 173 filed herein on behalf of the Respondent The Cement Institute.

174. (a) Respondent excepts to the finding that Pacific Coast Cement Institute was organized for the purpose of being received as a division of The Cement Institute or that it was organized at all until after the organizers had ascertained from The Cement Institute that it would not accept or organize a coast office or branch of The Cement Institute. (Tr. 9173 et seq.)

(b) Respondent excepts to the finding that Pacific Coast Cement Institute renders monthly reports of business booked or that it has ever collected or disseminated any statistical information, except that in 1938 the Southern California members filed reports of specific job contracts as contracts were made showing the name of the purchaser, the location of the job, the description of the job and the number of barrels of cement involved but not showing the price, which reports were consolidated in alphabetical destination order and reported to the member companies, and except that once a month the auditors

of the Southern California members filed statements showing delinquent accounts, which reports were available to the four Southern California members.

(c) Respondent excepts to the finding that Pacific Coast Cement Institute has disseminated land grant rates from information received from railroads, except that on request of a Southern California member it has ascertained from the railroads the applicable land grant rate to the destination named in the request. (Tr. 9187-90, 42471-73.)

(d) Respondent excepts to the failure to find that Respondent has not had a bidding policy to base its bids on Government invitations on a destination price less commercial freight and plus an exact land grant rate, and exact land grant rates are of no importance in its method of bidding on Government invitations. (Tr. 42471-73, 42478-83.)

178-181. Exception is taken to paragraphs 178-181 on the ground that there is no evidence in the record connecting this Respondent with any of the acts or conduct reported in said paragraphs.

(b) Respondent excepts to the report or citation of and reliance on purported evidence of acts of respondents other than this Respondent, referred to in said paragraphs, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

182-183. (a) Respondent excepts to the finding or implication that except during the Code period it issued any price list to customers, competitors, or to any one or for any purpose except for use by the sales department and salesmen. (Tr. 32461-64, 42786.)

(b) Respondent excepts to the finding or statement that its prices to California points figured back to bases or to a uniform mill net, that the multiple basing system is used in any of Respondent's normal market area. (Tr. 42460-65, 42448.)

(c) Respondent excepts to the finding that prices generally in its market area are identical delivered prices in that prices on Government bids are generally f.o.b. mill prices and are not identical. (See exceptions to paragraphs 14, 94, 130-138 of Report.)

(d) Respondent excepts to the finding that terms are uniform. (See exceptions to paragraphs 148-150.)

(e) Respondent excepts to the finding or implication that it participated in any meetings or conferences or had any policy to suppress trucking. (Reference is made to the exceptions to paragraphs 120-122.)

(f) Respondent excepts to the report or citation of or reliance on purported evidence of acts of respondents other than this Respondent to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

184-187. (a) Exception is taken to paragraphs 184-187 on the ground that there is no evidence to connect this Respondent in any way with the acts or conduct referred to in said paragraphs.

(b) Respondent excepts to the report or citation of or reliance on any evidence of acts of respondents other than this Respondent reported in said paragraphs, to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

(c) Respondent excepts to the implication that Respondent through membership in the Institute or in any manner was identified with the Cree transactions. (Tr. 42446-48, 42494.)

188-195. (a) Exception is taken to paragraphs 188-195 on the ground that there is no evidence which in any way connects respondent with any of the acts or conduct therein referred to.

(b) Respondent excepts to any finding or implication that Respondent's membership in The Cement Institute in any manner connected it with any of the activities of the Institute referred to in said paragraphs, or that Respondent was in any way a party to or concerned with or affected by any of the activities referred to in said paragraphs. (Tr. 42446-48.)

(c) Respondent refers to and adopts the exceptions to said paragraphs filed on behalf of Respondent The Cement Institute.

(d) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent referred to in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice,

condition, agreement or common action against this Respondent.

196. (a) Exception is taken to the failure to report all of the evidence with reference to the joint bids referred to in the paragraph. (See Com. Ex. 128 (a), (b), (c)-(h), 129.)

(b) Exception is taken also to the failure to report the evidence that in each and every joint bid in which this Respondent has participated the facts in connection therewith and the reasons for making the bid jointly were fully disclosed to the public agency involved and a copy of the contract among the joint bidders was furnished to the Government agency.

(c) Exception is taken to the reference to alleged identical bids in April, 1937. (See exceptions to paragraph 14.)

197-199. (a) Respondent excepts to the failure to find that it has not employed the "basing point system of marketing". (See exceptions to paragraphs 88-92.)

(b) Respondent excepts to the finding or implication that it was in any way involved in any effort to bring the professors to the point of view of the advocates of the basing point price system, or that Respondent had anything to do with the studies except in submitting its answers to the questionnaire. (Tr. 42446-48.)

(c) Respondent excepts to the report or citation of or reliance on any evidence of acts of respondents other than this Respondent as reported in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of policy, practice, condition, agreement or common action against this Respondent.

200, 201. (a) Respondent excepts to the finding or implication that it had anything whatever to do with any acts of the Institute or its officers as Code Authority under the N. R. A. Code which were not authorized by the Code. (Tr. 42446-48.)

(b) Respondent excepts to the finding or implication that it bid identical prices in response to Government invitations during the Code period. (There is no evidence.)

(c) Respondent excepts to the finding or implication that it followed the Code procedure under the Trade Practice Committee of the Institute. (Tr. 42447, 42494.)

(d) Respondent excepts to the finding or implication

that if had anything to do with the Institute's receiving or sending out Land Grant Rate information. (See Tr. 42472.)

(e) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraph to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

202-203. (a) Respondent excepts to the finding or implication that its practice in selling on specific job contract or violations of the contract by the buyer in using cement other than on the specific job has been the cause of any unsettled price situation. (There is no evidence to such effect.)

(b) Respondent excepts to the finding or implication that it has agreed or joined in any action with reference to enforcement of specific job contracts, or to specific job contract report with the "industry" or with The Cement Institute or otherwise than is referred to in the exceptions herein to paragraph 174 of the Report, or that it has engaged in any joint action with any other respondent to inspect or survey specific jobs to ascertain that specific job contracts of Respondent or other respondents are not being violated. (There is no evidence.)

(c) Respondent excepts to the finding that the articles of incorporation of the Institute or the amended articles require members to make reports of specific job contracts or other contracts, or that it ever reported specific job contracts or other contracts to The Cement Institute, or that The Cement Institute reported specific job contract information to it. (Tr. 42447.)

(d) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraphs 202-203 to which the evidence does not show that this Respondent was a party, to support any finding or inference of policy, practice, condition, agreement or common action against this Respondent.

204. (a) Exception is taken to paragraph 204 on the ground that there is no evidence which in any way connects this Respondent with any acts or conduct therein referred to.

(b) Respondent excepts to the finding or implication that it was ever a member of the "association" referred to in the said paragraph. (Tr. 42493, Report 170-176.)

(c) Respondent excepts to the implication that its policy with reference to sack returns has been fixed by any agreement or cooperative action with any other respondent, or that it made use of the "code contract form" except to some extent during the Code period. (Tr. 42487-88. Resp. Ex. 3444, 3445.)

(d) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraph to which the evidence does not show that this Respondent was a party, to support any finding or inference of policy, practice, condition, agreement or common action against this Respondent.

205-206. (a) Exception is taken to paragraphs 205-206 on the grounds that there is no evidence which in any way connects this Respondent with the acts or conduct therein referred to.

(b) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of policy, practice, condition, agreement or common action against this Respondent.

207-211. (a) Exception is taken to paragraphs 207-211 on the ground that there is no evidence which in any way connects this Respondent with the acts or conduct therein referred to, except that Respondent has been interested in discussions of technical problems in the use of cement and in the ethical problem of misstating comparative qualities or performances of cement.

(b) Respondent refers to and adopts the exceptions to paragraphs 207-211 filed herein on behalf of Respondent The Cement Institute.

(c) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of policy, practice, condition, agreement or common action against this Respondent.

212-219. (a) Exception is taken to paragraphs 212-219 of the Report on the ground that there is no evidence in the record which in any manner connects this Respondent with the association's acts or activities therein referred to.

(b) Respondent excepts to the failure to find that Respondent has never been a member of Association of American Portland Cement Manufacturers, Cement Manufacturers' Protective Association, or Portland Cement Association, that Respondent did not subscribe to or report to the Mallory statistics or participate in the "Mallory plan," that Respondent did not report information concerning production, shipments, capacities, etc. to The Cement Institute. (Tr. 42493-94, 42447.)

(c) Respondent excepts to the finding or implication that any advantages of curtailment of production or its effect on prices were conceded by it. (There is no evidence.)

(d) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

220-223. (a) Exception is taken to paragraphs 220-223 on the ground that there is no evidence in the record which in any way connects this Respondent with the acts or conduct referred to in said paragraphs.

(b) Respondent excepts to any finding or implication that it had any knowledge or authorized or consented to any action of The Cement Institute referred to in said paragraphs, or that the Institute had any authority to take any such action or that Respondent reported any information to the Institute. (Tr. 42446-47.)

(c) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

224. (a) Respondent excepts to the finding or implication that it has or has had any policy or practice with reference to the payment of freight on cement sold at des-

lination price which is fixed or invariable for all customers, all customers of the same class, or for each customer for different transactions, or for its inter-state and intrastate business, or for all destination points or for the same destination point for different transactions. (Tr. 42488-90, 42793.)

(b) Respondent excepts to any implication that its policies or practices with respect to the payment of freight or with respect to the conception of "price" were fixed or followed through any agreement, understanding or common action with respondents in general or with any other respondent or respondents. (Tr. 42488-89. There is no evidence to this effect.)

(c) Respondent excepts to the finding or implication that it took steps in regard to the payment of freight to prevent dealers from having an advantage over dealer competitors. (Reference is made to the exceptions to paragraphs 123-129 of the Report.)

(d) Respondent excepts to the finding or implication that it made use of the contract forms in the Compendium or that it recognized or agreed to or observed any "rule" in the Compendium. (Reference is made to the exceptions to paragraphs 148-150 of the Report.)

(e) Respondent excepts to any implication that its "price" is anything other than the price at which it has quoted and sold cement. (Tr. 424161-63. Com. Exh. 1304-1312. Tr. 9322.)

(f) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraph to which the evidence does not show that this Respondent was a party, to support any finding or inference of policy, practice, condition, agreement or common action against this Respondent.

226. (a) Exception is taken to paragraph 226 on the ground that there is no evidence in the record which in any way connects this Respondent or its practices in pricing cement with the testimony of the witness therein referred to.

(b) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraph to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice,

condition, agreement or common action against this Respondent.

227. Respondent refers to and adopts the exceptions to paragraph 227 filed herein on behalf of Respondent The Cement Institute.

228-229. (a) Respondent excepts to the finding or implication that there was not true and keen competition between Respondent and each of its competitors in the trade area in which Respondent has marketed its product, competition in price in trucking policy, in savings on quantity purchases and in bidding on Government invitations. (Tr. 42491, 42478-84, 42474-76, 42505-829, 9318-37.)

(b) Exception is taken to paragraph 229 on the ground that there is no evidence in the record on which the conclusion expressed in said paragraph can be made as to this Respondent.

(c) Respondent excepts to the report or citation of or reliance on evidence of acts of respondents other than this Respondent reported in said paragraphs to which the evidence does not show that this Respondent was a party, to support any finding or inference of any policy, practice, condition, agreement or common action against this Respondent.

Respondent excepts to the admission, report or consideration of evidence of the acts, practices and statements of this Respondent and of each of its competitors in intra-state business within the State of California, in the conduct of intra-state business within the State of California, in connection with any issue raised by count one of the complaint, on the ground that such evidence is irrelevant and immaterial to any such issue. (Tr. 42455-60.)

Respondent excepts generally to the failure to find and report with respect to Respondent California Portland Cement Company in accordance with the contentions of said Respondent submitted to the Trial Examiner pursuant to Rule XXII of the Rules and Practice of the Federal Trade Commission.

Dated: November 8, 1941.

Respectfully submitted,
Call, Murphey & Davis,
Alex W. Davis,
Attorneys for Respondent California Portland Cement Company.

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

(Caption 3167).

EXCEPTION OF MONOLITH PORTLAND CEMENT COMPANY TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Received Nov. 14, 1941.)

1. Exception is taken to the unsupported implication suggested by Paragraph 82 and the footnote to page 9, that Monolith Portland Cement Company is "identified or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited. (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, Supra).

2. Exception is further taken to the unsupported assertion in Paragraph 82 and the footnote to page 9 that Monolith is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that executives of the Monolith company denied that the company had entered into any conspiracy with anyone with reference to the sale of cement (Tr. 48110).

4. Exception is taken to the failure to report the following evidence regarding Monolith's membership in The Cement Institute:

Monolith did not become a member of the Institute until after the Institute's Code of Ethics had been officially cancelled (Com. Ex. 606 H; Resp. Ex. 2173 B-C; 2174 C; Tr. 16699; 16927-29).

The company has never participated in any of the Institute's statistical services (Com. Ex. 595 C; Tr. 2809; 16710-11) nor has it ever received or used the Institute's rate service which never extended to the territories in which it does business (Com. Ex. 595 D-E; Tr. 3154-56; 16852-53).

There is no evidence that the Institute ever formulated

or interpreted or attempted to formulate or interpret any of Monolith's policies or practices.

5. Exception is taken to the statement that Monolith's bid on the letting represented by Com. Ex. 120 B, cited in Paragraph 45, was identical with those of other bidders on the ground that it is contrary to the evidence. Exception is further taken to the failure to report that on the letting refererd to in Com. Ex. 120 B, cited, Monolith bid a price which was not identical with any of the prices bid by other bidders (Com. Ex. 120 B). Moreover, Com. Ex. 120 B, cited, shows that the letting referred to took place on May 3, 1937 and not on May 31, 1937 as stated in Paragraph 45.

6. Exception is taken to the failure to report that the letting referred to in Com. Ex. 111 F, cited in Paragraph 45, took place during the period when open price filing provisions of the NRA Cement Code were in effect; that Monolith bid the destination cost for Odair, Wash., which was on file with the NRA Code Authority; and that this price was 36c lower than Monolith's commercial price list price for that destination which was also the commercial price on file at the time with the Code Authority (Com. Ex. 277 N; 2127).

7. Exception is taken to the statement in Paragraph 45 that Monolith was "involved in identical bidding" on April 9, 1937 on the ground that it is contrary to the evidence (Resp. Ex. 3785).

8. Exception is taken to the failure to report that Monolith has submitted many bids to governmental agencies which were not identical with any of those submitted by other bidders (Com. Ex. 128 A-H; 129, 134 C-E; 378 T; 1099 A; 1303 A-B; 1339; 1381; 3261 S; Resp. Ex. 233 C; 273 A-H; 384 A-C; 3691 A-C; 3692; 3784 A-B; Tr. 10025; 10234-36; 10270-71). Exception is further taken to the failure to report that Monolith has submitted many f.o.b. mill bids to governmental agencies (Com. Exs. 124 A; 128 A-H; 129; 134 C-E; 1303 A-B; 1339; 1381; 3261 I, N, R, S; Resp. Exs. 233 C; 273 A-H; 290 H; 296 N; 297 B-N; 302 J; 384 A-C; 3691 A-C; 3692; Tr. 323; 10025; 10234-36; 10270-71). Further evidence regarding f.o.b. mill and non-identical bids was rejected by the Trial Examiner. (Resp. Ex. 3660 A, B, D, J, T, U, W, X, Z, Z2, Z11, Z12, Z14, Z16, Z18, Z21-Z25, Z27-Z34 for id.; Tr. 47700-04).

9. Exception is taken to the citation in Paragraph 45 of Com. Ex. 971-23A-23G and of Tr. 8612 and 8945 because

they do not relate to any policies or practices of the Monolith Company. Exception is further taken to the citation of Tr. 8634-37 and 8786 because they do not relate to communications of the Monolith Company.

Respectfully submitted.

Monolith Portland Cement Company,
By W. D. Burnett,
Atty.

UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—3167)

EXCEPTION OF MONOLITH PORTLAND MIDWEST COMPANY TO TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

(Received Nov. 14, 1941.)

1. Exception is taken to the unsupported implication suggested by Paragraph 82 and the footnote to page 9, that Monolith Portland Midwest Company is "identified" or connected by the evidence with any alleged activities of The Cement Institute or any alleged policies or practices of the Institute other than those authorized and contemplated by its Articles of Association and fully referred to and reported in the minutes. There is no evidence to support such implication and none is cited. (See below for further regarding the Institute; also exceptions to Paragraphs 1-6, supra.)

2. Exception is further taken to the unsupported assertion in Paragraph 82 and the footnote to page 9 that Monolith Midwest is "identified" or connected with "group activities" or industry policies and practices. There is no evidence to support the statement and none is cited.

3. Exception is taken to the failure to report that executive officers of the Monolith Midwest Company denied that the company had ever entered into any conspiracy of any kind with any competiter or anyone else with reference to the sale of cement. (Tr. 48110).

4. Exception is taken to the failure to report that Monolith is a small company with one mill having a capacity of 1800 barrels per day (Resp. Ex. 2520).

5. Exception is taken to the failure to report the following evidence regarding Monolith Midwest's membership in the Institute:

The Company did not become a member of the Institute until after the Institute's Code of Ethics had been officially cancelled (Resp. Exs. 2173B-C; 2174C; Tr. 16699; 16927-29; Com. Ex. 606H). The company has never participated in any of the statistical services of the Institute (Com. Ex. 595C; Tr. 2809; 16710-11) nor has it ever used the Institute's freight rate service (Tr. 3154-56; 16852-53; Com. Ex. 595D-E).

There is no evidence that the Institute has ever formulated or interpreted or attempted to formulate or interpret any of the company's policies or practices.

6. Exception is taken to the misleading statement in Paragraph 46 that Monolith Midwest was "involved in identical bidding" because it erroneously implies that the company has submitted sealed bids to federal or state governmental authorities which were identical with bids of competitors. The invoices of the Monolith Midwest company referred to in Paragraph 46 are invoices on cement sold to dealers on the open market at commercial prices f.o.b. mill or destination in all instances. Further exception is taken to the failure to cite any part of the record in support of the statement that Monolith Midwest's prices as shown on its invoices are identical with "those bid" by Colorado Portland Cement Co. and by Portland Cement Company of Utah.

Exception is further taken to the failure to report that there is no evidence that Monolith Midwest has ever submitted a bid on federal or state government work that was identical with that of any other bidder; and that the evidence is that on the one occasion that the company bid f.o.b. destination in response to an invitation of a governmental agency, its price was not identical with that of any other bidder (Com. Ex. 125B). Exception is further taken to the failure to report that the evidence shows that on all other invitations of governmental agencies in response to which Monolith Midwest bid, it bid prices f.o.b. mill only which were not identical with any prices quoted by any other bidders (Com. Ex. 127A-B; 1328-31; 1339; 1341; Resp. Exs. 384A; 3692; Tr. 10010-15; 10025; 10263-64; 10266-67; 10269-70; 10272).

7. Exception is taken to the failure to cite Tr. 9343-44

and Tr. 9346 in connection with Com. Ex. 1202G, H cited in Paragraph 46.

8. Exception is taken to the failure to report that Monolith Midwest delivers cement to trucks at its mill (Com. Ex. 2722-#3).

9. Exception is further taken to the failure to report that there is no evidence with regard to pricing and dealer policies or any other policies of the Monolith Midwest Company except those referred to supra and that executives of the company denied that they had ever had any agreements relating to the sale of cement (Tr. 48110).

Respectfully submitted.

Monolith Portland Midwest Company,
By W. D. Burnett,
Atty.